91-1384

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

CHARLES D. BATES, ET AL., RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when the parties have settled a case pending appeal on condition that the judgment of the district court be vacated, the federal courts should honor that condition, vacate the judgment, and eliminate its collateral estoppel effects.

2. Whether a judgment that has been vacated may serve as a source of offensive collateral estoppel.

RULE 14.1(b) AND 29.1 STATEMENT

In addition to those listed in the caption, the other parties to this proceeding are: respondents Allen P. Bellinger, Warren W. Fairbanks, Hugh E. Bellinger, Lavonne M. Bennett, Armond A. Boyer, Donal N. Dorrell, David Fox, Sterling T. Griffiths, Paul Hettervig, Alice Pauline Holley (personal representative of the Estate of Cecil G. Holley), Donald E. Holt, David J. Hooten, Gerald F. Howard, Richard Jentzen, Douglas D. Kendall, James Kirk, Clayburn Leonard, H. L. Montgomery, Tuan A. Nguyen, Dennis J. Olson, Tai Pham, Jack R. Puz, Arthur C. Vernon, Jewell Woolman.

Petitioner Union Oil of California is a wholly owned subsidiary of Unocal Corporation. Petitioner's only subsidiary that has issued shares to the public is Unocal Exploration Corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 944 F.2d 647. The opinion of the district court (App., *infra*, 15a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1991. A timely petition for rehearing was denied on December 2, 1991 (App., *infra*, 36a). The petition for a writ of certiorari therefore is due on or before March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT

1. In 1986, 45 retail dealers of petitioner Union Oil of California ("Unocal") brought a diversity action against the company in the United States District Court for the District of Oregon, contending that they had been damaged by Unocal's decision to reduce the octane of certain of its fuel and to cease the sale of leaded premium gasoline. See App., *infra*, 2a-3a. Although Unocal prevailed on some issues, the jury in that action, captioned *Amos* v. *Union Oil Co.*, 663 F. Supp. 1027 (D. Or. 1987), found that Unocal had breached an implied covenant of good faith in its relations with the dealers. The jury awarded the *Amos* plaintiffs a judgment against Unocal that represented alleged lost profits, damages for emotional distress, and punitive damages. See App., *infra*, 3a-4a.

While the *Amos* case was pending on appeal, Unocal and the dealers agreed to a settlement, under which Unocal would pay a substantially reduced sum to the plaintiffs and would withdraw its appeal, and the parties would obtain a vacatur of the district

court's judgment.[1] Unocal made clear at the time that it believed it had a substantial chance of prevailing on appeal; it emphasized that vacatur of the district court judgment was a nonnegotiable condition for settlement. See E.R. 104-108, 119-121.[2] When the district court indicated that it would be willing to grant the vacatur (see App., *infra*, 31a), Unocal, with the concurrence of the plaintiffs, moved the court of appeals to remand the case so that the district court could entertain a motion to vacate the *Amos* judgment pursuant to Fed. R. Civ. P. 60(b). E.R. 111.

In the brief accompanying this motion, Unocal advised the court of appeals of its concern that, if the *Amos* judgment were not vacated, future plaintiffs might attempt to use it against Unocal as a source of collateral estoppel. In voicing this concern, Unocal pointed to the holding in *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1187-1192 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983), that "if a defendant settles a case after trial, a stranger to the litigation may assert offensive collateral estoppel in a second suit brought against the same defendant." E.R. 113. Unocal noted that, "if the district court vacates the judgment below, under Rule 60(b), the opportunity of future litigants to invoke the '*Chemetron* rule' against Unocal will be diminished." *Ibid.* In response, the court of appeals

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[1] The settlement was achieved through use of the Ninth Circuit's informal settlement program, in which a circuit judge holds settlement conferences with the parties. See E.R. 119-120.

[2] "E.R." refers to appellant's excerpts of record in the court of appeals.

remanded the case "to allow the district court to rule upon a motion under Fed. R. Civ. P. 60(b)." App., *infra*, 32a.

On remand, the parties moved the district court to vacate its judgment pursuant to Fed. R. Civ. P. 60(b)(5) and (6), stating that "plaintiffs and defendant have agreed to settle this litigation if but only if this Court is willing to and does grant this motion." E.R. 116. In the accompanying brief, Unocal again explained that it insisted upon vacatur because it was concerned about the prospect of collateral estoppel, noting that "[t]his Court perhaps cannot prevent another litigant from attempting to invoke the '*Chemetron* rule' in some future case, but it should not lend its prior judgment to any such illicit purpose. Unocal submits that, per Rule 60(b)(5), 'it is no longer equitable that the judgment should have any prospective application,' and that the judgment should be vacated as prayed." E.R. 121. The district court granted the motion, ordering that the *Amos* judgment "shall be and is hereby vacated and set aside in its entirety." App., *infra*, 34a.

2. Shortly after the settlement and vacatur in *Amos*, respondents in this action, other Unocal dealers in the Pacific Northwest, brought a diversity suit against Unocal in the District of Oregon, stating claims similar to those that had been at issue in *Amos*; the same district judge who had heard *Amos* presided in this case as well. Respondents sought summary judgment, invoking the *Amos* judgment as a source of collateral estoppel. Unocal responded that a vacated judgment should not and could not be given collateral effect.

The district court ruled for respondents. It stated that "[m]y order of vacatur says nothing about the

preclusive effect of the *Amos* judgment, nor does it indicate my opinion on it. I vacated the *Amos* judgment so that the parties would settle the case." App., *infra*, 19a. Relying on *Chemetron* (see *id.* at 25a-27a), the court went on to reason that a vacated judgment may have collateral estoppel effects. The court explained: "Vacating the judgment, a ministerial act required to close a case after a jury verdict, has no effect on the finality of the jury's findings of facts. The factual issues I find collaterally estopped were fully and fairly litigated before the trier of fact." *Id.* at 28a.[3] And balancing Unocal's interest in settlement against what it perceived to be the public interest in finality, the court determined that preclusion is warranted because "[i]n this case, this concern [with preventing needless litigation] is served by preventing rather than allowing relitigation" of the issues addressed in *Amos*. *Id.* at 27a. The court accordingly awarded each of the 54 plaintiffs in this action the same $120,000 in punitive damages that had been awarded to each of the *Amos* plaintiffs; the jury subsequently awarded each of the plaintiffs here an average of $24,000 in economic damages—for a total award against Unocal of some $8 million. E.R. 303-374.

3. The court of appeals affirmed.[4] App., *infra*, 1a-13a. Although federal jurisdiction in this case is

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[3] This, of course, is the very question that Unocal would have presented in its appeal of the *Amos* judgment, but for the settlement of that case.

[4] In an unpublished opinion, the court of appeals also approved the application of collateral estoppel in *Hamilton* v. *Union Oil Company of California*, No. 90-35426 (9th Cir. Sept. 17, 1991), a companion case brought against Unocal by six of its dealers in Washington State. The plaintiffs in that suit, which also involved actions similar to those at issue in

grounded in diversity, the court first concluded that the preclusive effect of the *Amos* judgment is governed by federal law. See *id.* at 5a. With that established, the court referred to its rule, first announced in *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), that "a district court is not required to vacate a judgment when the appellant causes the dismissal of its appeal by settling." App., *infra*, 6a. Instead, in determining whether to grant vacatur, the Ninth Circuit requires the district court "to balance 'the competing values of finality of judgment and right to relitigation of unreviewed disputes.'" *Ibid.*, quoting *Ringsby*, 686 F.2d at 722. Ordinarily, the court continued, a judgment that is vacated after consideration of the *Ringsby* factors loses its preclusive effect. *Id.* at 6a-7a.

Here, however, the court of appeals found a special problem because the district judge did not advert to the *Ringsby* factors at the time of vacatur. In such circumstances, the court concluded that

> the *Amos* judgment did not lose preclusive effect simply because it was vacated, and that the *Ringsby* factors, although not considered at the time the *Amos* judgment was vacated, were properly considered by the district court when, in this case, it confronted the question of the preclusive effect of the vacated judgment.

App., *infra*, 8a. The court therefore held that, "[i]f the [district] court does not consider *Ringsby* in granting or denying the motion to vacate, the ques-

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Amos, were awarded damages and attorneys' fees that exceeded $250,000. We are challenging the *Hamilton* decision in a separate petition to this Court, which we are asking the Court to hold pending disposition of this case.

tion of issue preclusion from the first trial will remain open for subsequent determination in a later case." *Id.* at 8a-9a.

The court of appeals went on to find that the district court's application of collateral estoppel against Unocal was not unfair because, "[a]ssuming Unocal is correct in arguing that the *Amos* judgment is not free from legal error, the way to correct that error was by appeal in the *Amos* case. Unocal elected not to pursue that appeal." App., *infra*, 10a. The court added that "Unocal could have conditioned the dismissal of its appeal and settlement of the *Amos* case not merely on vacatur, but on vacatur following the district court's consideration of the *Ringsby* factors and determination that the judgment would not have preclusive effect. Unocal chose not to be so particular about the vacatur it obtained." *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

This case presents two related questions of substantial practical importance for the conduct of litigation in the federal courts. The first concerns the circumstances in which the federal courts should honor a provision conditioning a post-judgment settlement on vacatur of the judgment so as to preclude its use as a future source of collateral estoppel. Contrary to the rulings of several other courts of appeals, the Ninth Circuit has held that trial courts may disregard the parties' wishes on this point—a holding that will greatly diminish the availability of settlement pending appeal. At the same time, the court of appeals' holding that a vacated judgment may have collateral estoppel effects, even where the party that lost in district court has foregone an appeal on the condition that the judgment be vacated,

is a patently inequitable ruling that imports profound uncertainty into the settlement process and confounds traditional understandings embodied in the law of judgments. Both of these aspects of the decision below warrant this Court's consideration.

A. The Parties To A Post-Judgment Settlement May Settle On Terms That Require The District Court To Vacate The Judgment In A Manner That Precludes Its Future Use As A Source Of Collateral Estoppel.

1. *Vacatur as a Condition of Settlement.* As the dockets of the federal courts have become increasingly congested in recent years, courts and the bar have placed considerable emphasis on settlement as a favored means of terminating litigation. See, *e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982); Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976). Cf. *Evans* v. *Jeff D.*, 475 U.S. 717, 733, 736-737 (1986); *Marek* v. *Chesny*, 473 U.S. 1, 5, 10-11 (1985); Fed. R. Civ. P. 16(a)(5), (c)(7), 68. Of particular importance here, post-judgment settlements, achieved while cases are pending on appeal, have become a significant device for the resolution of lawsuits. See Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 590, 595 (1991). Indeed, four courts of appeals have given voice to the general interest in facilitating this development by implementing programs expressly designed to encourage post-judgment settlements. See Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 Yale L.J. 755 (1986); Lay, *A Blueprint for Judicial Management*, 17 Creighton L. Rev. 1047, 1063 (1984); Rack, *Pre-Argument Conferences in the Sixth Circuit Court*

of Appeals, 15 U. Tol. L. Rev. 921 (1984); J. Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* 81-82 (1985).

At the same time, however, settlement pending appeal has been discouraged by the liberalization of rules governing collateral estoppel—in particular, those governing nonmutual, offensive collateral estoppel. See generally *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). The reason for this is manifest. No matter how attractive the settlement offered by a prevailing party in a particular case, the loser is unlikely to forgo an appeal if it may find itself estopped by an indeterminate number of future plaintiffs who may assert similar claims. This case presents a paradigm of such a situation: knowing that many dealers in the Pacific Northwest might assert similar claims against it, Unocal would not have abandoned its appeal in the *Amos* litigation as an element of the settlement had it thought that, by doing so, it was essentially conceding liability for many millions of dollars in damages in all related future actions.

In response to this problem, a procedural device of growing importance has been the post-judgment settlement conditioned on vacatur of the judgment. As in this case, such a settlement typically is accomplished through a motion to the appellate court, which either may itself vacate the judgment or may remand the case to the district court so that the parties may jointly move that court for vacatur pursuant to Fed. R. Civ. P. 60(b). See, *e.g.*, *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280, 284 (2d Cir. 1985); Fisch, *supra*, 76 Cornell L. Rev. at 598-599. In such circumstances, the clear purpose and understanding is that the vacated judgment loses its collateral con-

sequences, thus freeing the losing party to abandon its appeal.

The importance of this procedure is reflected in the substantial—and largely favorable—body of commentary that the *Nestle* rule has generated from scholars and practitioners. See, *e.g.*, 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 216-217 n.22 (Supp. 1991); Barker, *Collateral Estoppel; Workers' Compensation*, N.Y. L.J., Apr. 23, 1990, at 3; Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 Fordham L. Rev. 233 (1989); Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. Ill. L. Rev. 731 (1987); Note, *The Impact of Collateral Estoppel on Postjudgmental Settlements*, 15 Sw. U.L. Rev. 343 (1985). Cf. Fisch, *supra*, 76 Cornell L. Rev. at 590 (footnote omitted) (opposing vacatur on request but noting that "most commentators view vacatur after settlement as a useful tool in encouraging settlements and reducing appellate caseloads"); Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860 (1987).

2. *The Conflicting Responses of the Courts of Appeals.* The courts of appeals have taken three "wholly different" and conflicting approaches to the development of this procedural device. Fisch, *supra*, 76 Cornell L. Rev. at 592; see also *id.* at 602. At least two courts of appeals (the Second and Federal Circuits) have held that parties are entitled as a matter of right to insist, as a condition of settlement, that the district court vacate a judgment in a manner that precludes its use as a source of collateral estoppel. To similar effect, three courts of appeals (the Fourth, Tenth, and Eleventh Circuits), applying this Court's

decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), appear to be of the view that judgments *automatically* should be vacated and denied collateral effect when the case is settled while on appeal. Three other courts of appeals (the Third, Seventh, and District of Columbia Circuits), in contrast, have held that parties never may obtain vacatur—and thus, necessarily, may not preclude use of judgments as sources of collateral estoppel in future litigation—by providing for it as a term of settlement. And one court of appeals (the Ninth Circuit) has taken an intermediate position, directing district courts to engage in a case-by-case balancing of factors in determining whether, upon settlement, judgments should be vacated and denied prospective collateral estoppel effect.

a. In *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985), the parties settled a trademark infringement action while the case was on appeal, upon the condition that the district court vacate its judgment. On remand, the trial court refused to grant the vacatur, citing (as did the district court in this case) the public interest in finality of judgments. See *id.* at 281; 596 F. Supp. 1445, 1451-1453 (D. Conn. 1984). Noting that the losing party "insists on vacatur of the district court's judgment as a condition of settlement so that the judgment will not automatically prevent it through the operation of collateral estoppel from enforcing the trademark in the future," the court of appeals reversed. 756 F.2d at 281. Judge Winter, writing for the court, reasoned that "the denial of the motion for vacatur is counterproductive because it will lead to more rather than less litigation." *Ibid.* The court of appeals thus held

that a district court abuses its discretion when it "subordinat[es] the parties' interests to what it consider[s] to be the public interest in the finality of judgments." *Id.* at 282. As is apparent from this analysis, the "Second Circuit believes that litigants are entitled to vacatur as a matter of right when they settle a case conditioned on vacatur." Fisch, *supra*, 76 Cornell L. Rev. at 610.

The Federal Circuit has endorsed the *Nestle* approach. In *Federal Data Corp.* v. *SMS Data Products Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987), the parties settled while appeal was pending, asking the Board of Contract Appeals to dismiss the action and vacate its award. The Board refused. See *id.* at 278-279. The court of appeals reversed, explaining that, "[l]ike the court in *Nestle*, we see no reason to force the parties here to continue the litigation." *Id.* at 279. The court accordingly held that, "[w]hen the parties have settled their differences, then the appropriate course of action is for the appellate court to dismiss the action and to vacate the judgment below." *Id.* at 280. The court added that "requir[ing] the parties who have settled their differences to continue to litigate (including further proceedings in this court) is unjust not only to the parties, but is wasteful of the resources of the judiciary." *Ibid.*

The Second Circuit has since substantially elaborated upon the *Nestle* rule in *Long Island Lighting Co.* v. *Cuomo*, 888 F.2d 230 (2d Cir. 1989) (*"LILCO"*), where it ordered vacatur even absent an express request from the settling parties. In *Nestle*, the court had concluded that the case was not moot because the settlement was conditional, noting that "[t]he presence of a live controversy is amply demonstrated by

Nestle's insistence on a vacatur prior to settlement so as to preserve its right to pursue an appeal should the judgment remain in effect." 756 F.2d at 282. But because the settlement in *LILCO* was not conditioned on vacatur, the court in that case found that the parties' agreement to terminate the litigation "clearly render[ed] th[e] case moot." 888 F.2d at 233. And while recognizing this Court's holding in *Karcher* v. *May*, 484 U.S. 72, 82 (1987), that vacatur of a district court judgment is inappropriate when a losing party simply forgoes appeal, the *LILCO* court reasoned that the *Karcher* rule "does not apply to situations in which both parties have agreed on settlement and vacatur of the judgment below." 888 F.2d at 234 (footnote omitted). The court added (*id.* at 234 n.4) that *Karcher*

> does not affect our practice of vacating the district court's judgment when parties settle pending appeal. * * * *Karcher* was in essence a case in which the losing party did not appeal. In the present action, [the losing party] is not declining to pursue its appeal * * * but has agreed not to do so in return for certain concessions from the defendants. Leaving a lower court's judgment intact in this situation would only serve to discourage and hamper settlement negotiations.

That also appears to be the position of the Fourth, Tenth, and Eleventh Circuits. Without elaborate discussion but citing this Court's decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) —which held that parties are entitled to vacatur when the case becomes moot "through happenstance" while on appeal—those courts have, upon settlement, vacated as moot the underlying district court judgments. *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir.

1986); *First National Bank* v. *Don Adams Mining Co., Inc.*, 844 F.2d 1445, 1446 (10th Cir. 1986); *Mur-Maid Enterprises, Inc.* v. *Townsend*, No. 90-8096 (11th Cir. Dec. 23, 1991). See Fisch, *supra*, 76 Cornell L. Rev. at 601 n.60.[5]

b. In contrast, the Seventh Circuit has taken a radically different approach. In *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988), the court read *Nestle* and *Federal Data* to hold that "court[s] of appeals automatically should vacate the district court's judgment in order to promote settlements." *Id.* at 1302. But the Seventh Circuit expressly disagreed, concluding that, "[i]f parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision." *Ibid.* As Judge Easterbrook explained for the court: "When a clash between genuine adversaries produces a precedent, * * * the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property." *Ibid.* The Seventh Circuit thus "espous[es] a mandatory rule of law" that precludes vacatur at the parties' request. Fisch, *supra*, 76 Cornell L. Rev. at 610 n.112.

The Seventh Circuit's approach has been adopted by the Third Circuit in *Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127 (1991), and by the D.C. Circuit in *In re United States*, 927 F.2d 626

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[5] Under this approach, the settling parties need not condition settlement on vacatur, or jointly request vacatur; upon settlement, the court of appeals vacates the judgment automatically at the request of the party that lost in district court. See *Munsingwear*, 340 U.S. at 40-41.

(1991). The Third Circuit—in contrast to the Second Circuit in *LILCO*—reasoned that a settled case, while moot, "bears a closer resemblance to *Karcher v. May* * * * than it does to *Munsingwear*," making automatic vacatur inappropriate. *Clarendon*, 936 F.2d at 130. And while noting that "other courts apparently routinely grant requests for vacatur of the district court opinion when so provided in a settlement agreement" (an approach that, it observed, "is supported by some respected commentators"), the Third Circuit endorsed the Seventh Circuit's view that such "action by the court can be neither purchased nor parlayed by the parties." *Id.* at 129. Similarly, the D.C. Circuit found *Munsingwear* inapplicable "when a matter has been mooted after judgment only because the parties have entered into a settlement" (*In re United States*, 927 F.2d at 627), also finding "the reasoning of *Memorial Hospital* persuasive" (*id.* at 628).

c. The Ninth Circuit announced its intermediate rule in *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (1982), the decision upon which it relied in this case. The court there held that "it is not the duty of the appellate court to direct dismissal of the action" when entertaining joint vacatur motions following settlement. *Id.* at 722. Instead, the court continued, "[t]he answer may be different in different cases as equities and hardships vary the balance between the competing values of right to relitigate and finality of judgment." *Ibid.* The Ninth Circuit more recently reaffirmed the *Ringsby* principle in *National Union Fire Ins. Co.* v. *Seafirst Corp.*, 891 F.2d 762 (1989), where it expressly rejected both the analysis of *Nestle* and the "inflexible" approach of *Memorial Hospital*. *Id.* at 768-769.

The decision below added another oddity to the Ninth Circuit's rule by holding that the balancing of equities (and thus the decision whether the underlying judgment may serve as a source of collateral estoppel) may be conducted *either* at the time of vacatur *or* at some subsequent point. In contrast, the Second (and presumably the Federal) Circuit understands that vacatur granted to facilitate settlement *itself* strips the vacated judgment of collateral effects.[6] That also is the manifest intent of the other courts that hold *Munsingwear* applicable in these circumstances, since the *Munsingwear* rule is applied for the express purpose of "prevent[ing] a judgment, unreviewable because of mootness, from spawning any legal consequences." 340 U.S. at 41. But this disagreement over procedure (discussed more fully below) should not obscure the fundamental substantive differences between the courts of appeals: the Second and Federal (and, evidently, the Fourth, Tenth, and Eleventh) Circuits assure litigants that they may, through settlement, avoid collateral estoppel in *all* cases; the Ninth Circuit permits litigants to avoid collateral estoppel in *some* cases; and the Third, Seventh, and District of Columbia Circuits

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[6] The Second Circuit recognized that Nestle's only purpose in seeking vacatur was to avoid future collateral estoppel; as a consequence, "virtually every other sentence in Judge Winter's opinion [in *Nestle*] suggests that litigants prepared to settle may contract with impunity over preclusive effects of their dispute." *Harris Trust & Savings Bank* v. *John Hancock Mutual Life Ins. Co.*, 722 F. Supp. 998, 1011 (S.D.N.Y. 1989). Indeed, the *LILCO* court granted vacatur for the express purpose of precluding use of the vacated judgment as a source of *res judicata*. See 888 F.2d at 233-234.

allow litigants to avoid collateral estoppel as a matter of right in *no* case.

d. This conflict warrants the Court's attention. The differing approaches taken by the courts of appeals are not merely matters of internal circuit policy as to which inconsistency is tolerable. Instead, the conflict stems largely from disagreement about the application of two of this Court's decisions, *Karcher* and *Munsingwear*, and from differing approaches to the nature of district court discretion in implementing Fed. R. Civ. P. 60(b).

On both points, the inconsistent rules adopted by the courts of appeals mean that identical cases will be resolved differently in different circuits. Had this case arisen in the Second, Fourth, Tenth, Eleventh, or Federal Circuits, it is clear that Unocal would not have been estopped from defending against the $8 million liability to the *Bates* plaintiffs that it now faces in this case. Conversely, had the dispute with its dealers arisen in the Third, Seventh, or D.C. Circuits, vacatur would have been refused in the *Amos* case and Unocal would have retained its appellate remedies. In the Ninth Circuit, however, Unocal has both lost its appeal and suffered an estoppel. This disuniformity in approach on a matter of substantial importance to sound judicial administration should be cured by this Court.

3. *The Decision Below Lacks Merit.* The decision below warrants review not only because it compounds the confusion in the lower courts but also because it is plainly wrong. The Ninth Circuit itself has noted that *Ringsby* "has been roundly criticized." *Harrison Western Corp.* v. *United States*, 792 F.2d 1391, 1394 n.2 (9th Cir. 1986). And as the leading scholars in

this area have noted, nonmutual issue preclusion

> should not be elevated to a status that makes every private lawsuit a public event in which courts view their findings as matters of self-interest and the interest of nonparties involved in parallel litigation. * * * Courts should not intrude this far on the settlement process in the hope of benefitting themselves and nonparties through nonmutual preclusion.

13A C. Wright, A. Miller & E. Cooper, *supra*, § 3533.10, at 216-217 n.22 (Supp. 1991). Addressing the rule of *Memorial Hospital*, these scholars found it "particularly daunting to contemplate that even after the parties have preferred to surrender the opportunity to appellate review as a matter of right in order to achieve the certainty and economy of settlement, they can do so only if they are willing to submit to nonmutual issue preclusion in litigation with nonparties." *Id.* at 217. And specifically criticizing the rule set out by the Ninth Circuit in *Ringsby*, they noted:

> All of the policies that make voluntary settlement so important a means of concluding litigation apply. The appellee as well as the appellant may prefer settlement, and can bargain for whatever further protection it needs. It cannot be argued that the possible non-mutual preclusion interests of nonparties justify either appellate decision against the wishes of the parties, or an insistence that as a price of settlement the appellant must permit the district court judgment to support nonmutual preclusion. The parties should remain free to settle on terms that require vacation of the judgment, entry of a new consent judgment, or such other action as fits their needs.

Id. § 3533.10, at 432 (1984) (footnote omitted).

These observations have obvious force. The benefits —both to the parties and to the judicial system—of

precluding use of a judgment for purposes of collateral estoppel when that is necessary to achieve settlement are immediate and tangible: it pretermits an unnecessary appeal (and, perhaps, district court proceedings on remand); it precludes the appellate court from needlessly creating law; and it spares the parties the expense and uncertainty of continuing litigation. On the other hand, the public interest militating against automatic vacatur, principally the prospect of avoiding future litigation through the application of nonmutual collateral estoppel, is both speculative and of debatable societal value.[7]

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[7] This Court has recognized that offensive collateral estoppel—the sort at issue here—"does not promote judicial economy in the same manner as defensive use does." *Parklane*, 439 U.S. at 329. As the Court explained: "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. * * * Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action." *Id.* at 330 (footnote omitted). See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457 (1968). While the Court nevertheless has permitted the limited use of offensive collateral estoppel (see *Parklane*, 439 U.S. at 331-333), courts surely should not adopt policies that place a greater premium on the facilitation of collateral estoppel than on the encouragement of settlements—which are favored in virtually all circumstances. Yet the Ninth Circuit's approach "can be supported only by attributing a great value to nonmutual preclusion. Nonmutual preclusion, always a risky matter, is even riskier when it rests on findings that were not open to the appellate review

In this calculus, it seems plain that "[s]ubstantial, immediate and actual interests should be given more weight than remote and speculative ones." Note, *supra*, 58 Fordham L. Rev. at 240 (footnote omitted). And as Judge Winter noted for the Second Circuit, it is difficult to see why a court should "force th[e] [prevailing parties], who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation" (*Nestle*, 756 F.2d at 284)—particularly when "[t]heir only compensation for carrying this burden is the gratitude of the next plaintiff." Note, *supra*, 1987 U. Ill. L. Rev. at 752.

Furthermore, the Ninth Circuit's case-by-case approach offers the worst of both worlds. First, by permitting the parties to engage in potentially lengthy and intricate settlement negotiations that ultimately may be rejected by the district court, the *Ringsby* rule introduces yet another layer of delay and uncertainty into the appellate process. In addition, the denial of vacatur would likely generate an additional issue on appeal. And finally, a trial judge's decision to grant vacatur after considering the *Ringsby* factors provides no assurance that the judge in a subsequent case would not apply collateral estoppel on the ground that the *Ringsby* factors had been misapplied and the judgment should not have been vacated. The holding below on this point accordingly warrants review.

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that is built into our adversary system and that has shaped the nature of trial courts and procedures." 13A C. Wright, A. Miller & E. Cooper, *supra*, § 3533.10, at 216 n.22 (Supp. 1991).

B. Vacated Judgments Should Not Be Given Collateral Effect.

There is more to the decision below than the criteria governing whether courts should honor a condition of settlement that would require vacation of a judgment and removal of its potential collateral effects. The court of appeals approved action that was little short of a judicial ambush by concluding that a decision that *has been vacated* nonetheless may be a source of collateral estoppel if the district court did not make certain findings at the time of vacatur. That ruling, which holds that a vacated judgment may continue to bind the parties, misapprehends the nature of vacatur and cannot be reconciled with the holdings of other courts of appeals. It also will seriously impede the post-judgment settlement of any case in which the losing party is an enterprise that operates on a national basis. The holding below limiting the effect of vacatur accordingly also merits this Court's attention.

1. *Inconsistency With Other Courts of Appeals.* At the outset, the court of appeals' determination that preclusion may flow from a vacated judgment conflicts with what appears to be black letter law in virtually every other circuit: "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). Accord, *e.g.*, *No East-West Highway Comm., Inc.* v. *Chandler*, 767 F.2d 21, 24 (1st Cir. 1985); *Hill* v. *Western Electric Co.*, 672 F.2d 381, 387-389 (4th Cir.), cert. denied, 459 U.S. 981 (1982); *Savidge* v. *Fincannon*, 836 F.2d 898, 906 & n.33 (5th Cir. 1988); *Quarles* v. *Sager*, 687 F.2d 344, 346 (11th Cir. 1982); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and*

Procedure § 4432, at 302 (1981); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.416[2], at 517 (1991); Fisch, *supra*, 76 Cornell L. Rev. at 615-616 & nn.144-145; Note, *supra*, 96 Yale L.J. at 863-864; Note, *supra*, 1987 U. Ill. L. Rev. at 744.[8] Indeed, as this Court indicated in *Munsingwear* (and as the Second Circuit made clear in *Nestle* and *LILCO*), it is the principal *purpose*

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[8] It appears that the only reported exception to this principle, apart from this case, is *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1187-1192 (5th Cir. 1982), vacated and remanded on other grounds, 460 U.S. 1007 (1983). See Fisch, *supra*, 76 Cornell L. Rev. at 618. There, a divided panel gave preclusive effect to findings of fact that had been withdrawn prior to the entry of judgment as a condition of settlement; the court did not expressly consider the relevance of the withdrawal of the findings, instead addressing itself to the question whether the district court's order embodying the findings had been sufficiently final to support collateral estoppel. See 682 F.2d at 1190-1192. Judge Reavley nevertheless dissented from the holding on collateral estoppel, arguing that it "undermines the strong public interest in the settlement of lawsuits" by depriving the settling party of "the primary benefit of his agreement to settle while resulting in almost no saving in time or resources to the litigants or the courts." *Id.* at 1200. The *Chemetron* holding subsequently was vacated by this Court on other grounds, reinstated by the panel on remand, and again vacated when the Fifth Circuit agreed to rehear the case en banc; the case then settled prior to an en banc ruling. For that reason, the Fifth Circuit does not regard it as having precedential force. See *Avondale Shipyards, Inc.* v. *Insured Lloyd's*, 786 F.2d 1265, 1273 n.11 (5th Cir. 1986). That court has since held that "[a] decree that has been vacated or nullified by an appellate court cannot be given res judicata effect." *Savidge*, 836 F.2d at 906 (footnote omitted). The *Chemetron* approach has been roundly criticized by commentators and, until now, has not been followed by any other court. See Fisch, *supra*, 76 Cornell L. Rev. at 619-620; Note, *supra*, 1987 U. Ill. L. Rev. at 744.

of vacatur to strip judgments of their collateral consequences. The courts of appeals that decline to vacate judgments at the request of settling parties thus take that position precisely because they intend to preserve those judgments' collateral effects. See, *e.g.*, *Memorial Hospital*, 862 F.2d at 1302-1303.

The contrary holding below—that a non-judgment can have the effects of a judgment—is patently illogical. Almost by definition, a judgment that has been vacated cannot continue to have *any* legal effects, either direct or collateral—unless the procedural device of vacatur is largely meaningless. Certainly, a vacated judgment no longer is directly enforceable between the parties; the *Amos* plaintiffs, for example, could not now come into court and insist on payment by Unocal of the full judgment entered by the trial judge. Yet the court of appeals has held that a vacated judgment may continue to be binding between a party to the litigation and *nonparties* as to collateral matters. No reason of policy supports such a distinction. To the contrary, in circumstances such as those here, a judgment is vacated because, in the language of Fed. R. Civ. P. 60(b)(5) and (6), "it is no longer equitable that the judgment should have prospective application" or some other "reason justif[ies] relief from the operation of the judgment." As collateral estoppel surely involves the "prospective application" and "operation" of a judgment, the factors that warrant dissolving a judgment's binding force between the parties also should obviate its collateral consequences.

2. *Effects on Settlement.* The flaw in the Ninth Circuit's decision goes beyond the illogic of its reasoning; as a practical matter the court of appeals' ruling will put a sharp brake on post-judgment settlements, particularly those involving entities that

operate—and may become involved in litigation—nationwide. Until now, vacatur upon settlement has provided such litigants with almost certain assurance that they would not face collateral consequences from an adverse judgment. But with the Ninth Circuit's decision, that is no longer the case.

Indeed, the decision below will prevent national enterprises from settling even in jurisdictions, like the Second Circuit, that permit the parties to settle on the condition that a judgment be vacated in a manner that strips it of its collateral effects. A party may be confident that a vacated judgment will not have collateral consequences in the Ninth Circuit only if the district court considered the "*Ringsby* factors" at the time of vacatur. See App., *infra*, 8a (rejecting "a rule which would deny preclusive effect to a judgment simply because it was vacated"); *id.* at 8a-9a ("[i]f the court does not consider *Ringsby* in granting or denying the motion to vacate, the question of issue preclusion from the first trial will remain open for subsequent determination in a later case"). But judges in the Second and Federal (and, it appears, the Fourth, Tenth, and Eleventh) Circuits do not look to those factors; instead, they grant vacatur automatically upon settlement (at least if requested to do so). Because that action is non-discretionary, a litigant would presumably be unable to induce the judges in those circuits to render advisory opinions on the application of the *Ringsby* factors to the cases before them.

Thus, parties to a controversy that could recur in the courts of the Ninth Circuit will have no way of knowing whether a judgment vacated in another jurisdiction may be used to collaterally estop them in Ninth Circuit litigation. Prudent litigants accord-

ingly will be hesitant to settle despite the announced policy of the *Nestle* rule to encourage settlements pending appeal. In these circumstances, a uniform national rule on the consequences of vacatur is imperative.

The application of the Ninth Circuit's rule in this case starkly illustrates its potentially inequitable consequences. Unocal, it is fair to say, was effectively tricked by the district court into abandoning its appeal in *Amos*. As the district judge candidly acknowledged at the time that he held Unocal to be collaterally estopped, "I vacated the *Amos* judgment so that the parties would settle the case." App., *infra*, 19a. Yet Unocal repeatedly indicated that it was prepared to settle only because it understood vacatur to provide protection against collateral estoppel. The district judge said nothing to disabuse Unocal of that reasonable understanding. While Unocal recognized that other parties might attempt to collaterally estop it in other courts, it surely was entitled to assume that it would not be estopped in the same jurisdiction (and by the same judge) that was involved in the *Amos* litigation. Similarly, while the court of appeals took Unocal to task for failing expressly to condition settlement on "vacatur following the district court's consideration of the *Ringsby* factors" (App., *infra*, 11a), there was no reason for Unocal to suppose that the district court, in vacating the *Amos* judgment, either would be unaware of or would disregard *Ringsby*—which was, after all, the controlling Ninth Circuit precedent.

In fact, it is doubtful that this Court's decisions even permit collateral estoppel to be applied in these circumstances. The Court has emphasized the importance of "the requirement of determining whether

the party against whom an estoppel is asserted had a full and fair opportunity to litigate" the issue. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Plainly, where an appeal of right is provided by law, that opportunity includes consideration by the appellate court of claimed errors. The Court has also noted, in particular, the danger that "offensive use of collateral estoppel * * * may be unfair to a defendant." *Parklane*, 439 U.S. at 330. Here, Unocal lost its opportunity to fully litigate the relevant issue on appeal because it was bamboozled into forgoing appellate proceedings.

Beyond that, collateral estoppel was utilized here to levy a multimillion dollar punishment on Unocal while foreclosing the company's opportunity to persuade a second jury to exercise its very broad discretion not to impose punitive damages at all, or to impose a more modest amount of punitive damages (especially because the first verdict had already produced a substantial punishment that might have been found sufficient by a second jury). Against this background, this Court should conclude that the patently inequitable result obtained below is an unacceptable extension of the *Parklane* doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1992

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 90-35199

CHARLES D. BATES; CHRISTINE A. BATES; BELLINGER BROTHERS; ALLEN P. BELLINGER; HUGH E. BELLINGER; MARILYN H. BELLINGER; WINEFORD E. BENNETT, *et al.*,

Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, doing business as UNOCAL, a foreign corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted June 5, 1991

Decided Sept. 20, 1991

George A. Cumming, Jr., Broneck, Phleger & Harrison, San Francisco, Cal., for defendant-appellant.

Elden M. Rosenthal, Rosenthal & Greene, Portland, Or., for plaintiffs-appellees.

Before WRIGHT, FARRIS and THOMPSON, Circuit Judges.

INTRODUCTION

DAVID R. THOMPSON, Circuit Judge:

Union Oil Company of California (Unocal) lost a lawsuit filed against it by a number of its retail dealers in the United States District Court in Oregon. While Unocal's appeal was pending, it settled the case. To fulfill a condition of the settlement, the judgment in the district court was vacated.

Other Unocal dealers then sued Unocal in the United States District Court in Oregon alleging some of the same claims as those litigated in the first lawsuit. The district court applied collateral estoppel to resolve issues of liability and punitive damages in this second suit. A jury determined compensatory damages and this appeal followed.

Unocal argues the judgment in the first lawsuit lost its preclusive effect when it was vacated. Alternatively, Unocal contends the district court abused its discretion by applying collateral estoppel from the vacated judgment.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

FACTS AND PROCEEDINGS

In the first action, *Amos v. Union Oil Co.*, 663 F.Supp. 1027 (D.Or. 1987), forty-five Unocal oil dealers sued Unocal. District Court Judge Owen M. Panner presided over the trial. The plaintiffs pleaded five claims: (1) breach of express contract provisions

relating to "competitive quality" and "competitive price," (2) tortious interference with business relations, (3) contractual breach of an implied covenant of good faith and fair dealing, (4) tortious breach of an implied covenant of good faith and fair dealing ("tortious breach of contract"), and (5) fraud. The claims involved Unocal's sudden switch from 89 octane fuel to 87 octane fuel and its substitution of unleaded premium for leaded premium fuel.

Unocal and its dealers acquired a special position in the market by offering 89 octane fuel while other oil companies offered only 87 octane fuel. Although Unocal charged higher prices for its 89 octane fuel, Unocal dealers remained competitive by emphasizing the uniqueness and quality of their product.

Without warning to its dealers, Unocal discontinued its 89 octane fuel, but continued to sell its 87 octane fuel at the higher octane fuel prices. The substitution of a lower quality and commonplace fuel, without a price decrease, significantly reduced the dealers' ability to compete.

Unocal also discontinued its other unique product, leaded premium fuel. Unocal supplied its dealers with unleaded premium without informing them or the public of the substitution. Unocal priced its unleaded premium at the higher leaded premium prices and for a period of time denied rumors of the switch from leaded to unleaded premium fuel. The dealers presented evidence of numerous consumer complaints and lost business as a result of this deception.

The jury awarded the *Amos* dealers lost profits on their contractual breach of implied covenant of good faith and fair dealing claim. The jury also found in favor of the dealers on their tortious breach of con-

tract and fraud claims, and awarded emotional distress and punitive damages.

Unocal appealed the *Amos* judgment. While the appeal was pending, Unocal and the dealers agreed to settle the case. The parties conditioned their settlement on the district court's vacatur of the *Amos* judgment. Judge Panner, who had presided at the trial, was advised of the parties' conditional settlement and indicated he would satisfy the condition of settlement and grant the motion to vacate pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6) if the case were remanded to him. The case was remanded to the district court, and Judge Panner vacated the *Amos* judgment.

Other Unocal dealers (the "*Bates* plaintiffs") then brought this diversity action. Judge Panner again presided over the case. The *Bates* plaintiffs sought summary judgment on three claims: (1) contractual breach of an implied covenant of good faith and fair dealing, (2) tortious breach of contract, and (3) fraud. The *Bates* plaintiffs argued summary judgment was appropriate because collateral estoppel applied from the vacated *Amos* judgment. Unocal responded that because the *Amos* judgment was vacated, it would not support an application of collateral estoppel. Judge Panner disagreed and stated: "My order of vacatur says nothing about the preclusive effect of the *Amos* judgment, nor does it indicate my opinion on it. I vacated the *Amos* judgment so that the parties would settle the case." Judge Panner then applied collateral estoppel from the vacated *Amos* judgment and resolved the liability issues in this case against Unocal. Judge Panner also used collateral estoppel from the vacated *Amos* judgment to award the *Bates* plaintiffs $120,000 in punitive

damages. A jury awarded compensatory damages to each plaintiff.

DISCUSSION

A. Applicable Law

In a diversity case, a federal district court must apply federal law to determine whether to vacate a judgment as a condition of settlement. *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 765-68 (9th Cir. 1989). In a subsequent diversity action, however, the forum state's law applies to determine the preclusive effect of a previous judgment. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982). Thus, in this diversity case, we must apply Oregon law to determine the preclusive effect of the *Amos* judgment.

Oregon has yet to resolve whether it would apply its own law or federal law to determine the preclusive effect of a prior federal diversity judgment. *See Hanson v. Department of Revenue*, 294 Or. 23, 29-30, 653 P.2d 964, 967-68 (1982) (applying both federal and Oregon law to determine preclusive effect of prior federal judgment). We assume that Oregon, like Washington and California, would apply federal law to determine the preclusive effect of a prior federal judgment. *See Alcantara v. Boeing Co.*, 41 Wash.App. 675, 678, 705 P.2d 1222, 1225 (1985); *Levy v. Cohen*, 19 Cal.3d 165, 172-73, 137 Cal.Rptr. 162, 167, 561 P.2d 252, 257, *cert. denied*, 434 U.S. 833, 98 S.Ct. 119, 54 L.Ed.2d 94 (1977). Therefore we apply federal law to determine the preclusive effect of the vacated *Amos* judgment.

B. Availability of Collateral Estoppel

We review de novo whether collateral estoppel is available. *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1519 (9th Cir. 1985). The question we consider is whether a judgment vacated as a condition of settlement can have preclusive effect.

We have held a district court is not required to vacate a judgment when the appellant causes the dismissal of its appeal by settling. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982); *see also National Union*, 891 F.2d at 768-69; *Allard v. DeLorean*, 884 F.2d 464, 467 (9th Cir. 1989). In *Ringsby*, we distinguished this situation from *United States v. Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), which required a court to vacate a judgment if circumstances beyond the appellant's control deprived the judgment of appellate review. We reasoned a district court is not required to vacate a judgment pursuant to settlement because, otherwise, "any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books." *Ringsby*, 686 F.2d at 721.

When the parties seek vacatur as a condition of settlement, the district court may refuse to vacate the judgment. In deciding whether to vacate the judgment, we have directed district courts to balance "the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Id.* at 722.

The purpose of this balancing process is to enable a district court to consider fully the consequences of vacatur. If the court weighs the *Ringsby* factors and refuses to vacate the judgment, the judgment may have preclusive effect. If, however, the district court

considers the *Ringsby* factors and vacates the judgment, the judgment will lose any preclusive effect and the party who sought vacatur can safely forego an appeal.

The problem occurs when the district court vacates the judgment, but the record fails to disclose that the court considered the *Ringsby* factors at the time of vacatur.[1] Here, according to the record, the *Ringsby* factors were not considered until the district court ruled in the present case on the preclusive effect of the vacated judgment. At the time of this ruling, the district court balanced the interest in finality of judgments against the interest in allowing relitigation of unreviewed judgments, and determined that the application of collateral estoppel from the vacated *Amos* judgment was appropriate. The district court reasoned that relitigation of the liability and punitive damage issues in this case "after a full and fair jury trial" of those same issues in *Amos* would be a waste of judicial resources. The court further stated:

> The interest in settlement is one that every trial judge confronts daily. I do not dismiss it lightly,

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[1] In its brief in support of vacatur, Unocal indicated its concern with *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007, 103 S.Ct. 1245, 75 L.Ed.2d 476 (1983), and with the possible preclusive effect of the *Amos* judgment if vacated. In *Chemetron*, the Fifth Circuit held that issue preclusion based on facts found in an earlier case could apply in a subsequent case even though the trial court's written findings of fact in the earlier case had been withdrawn as a condition of settlement prior to entry of judgment. *Id.* at 1187-92. Neither party, however, called Judge Panner's attention to *Ringsby*, nor suggested a condition of their settlement was that the court determine the judgment would not have preclusive effect.

> but consider it as a factor to balance against an equally strong interest in finality. Settlement and finality are not countervailing considerations. At their core is the common concern for preventing needless litigation and the waste of the court's, the litigants', the jurors', and the public's resources. In this case, this concern is served by preventing rather than allowing relitigation.

We hold that the *Amos* judgment did not lose preclusive effect simply because it was vacated, and that the *Ringsby* factors, although not considered at the time the *Amos* judgment was vacated, were properly considered by the district court when, in this case, it confronted the question of the preclusive effect of the vacated judgment.

To hold otherwise would be to approve of a rule which would deny preclusive effect to a judgment simply because it was vacated. Such a rule would encourage litigants to avoid bringing the *Ringsby* factors to the attention of the district court. The party seeking vacatur as a condition of settlement would have no reason to mention *Ringsby;* the mere circumstance of vacatur would destroy the judgment's preclusive effect. Nor would the party faced with such a motion have any interest in bringing up *Ringsby;* to do so might risk a denial of vacatur and the failure of a condition of settlement.

On the other hand, the rule we adopt today encourages the party seeking vacatur to call to the district court's attention the requisite *Ringsby* factors at the time vacatur is sought. The district court can then perform the balancing task according to *Ringsby* and decide whether to vacate the judgment. If the

court does not consider *Ringsby* in granting or denying the motion to vacate, the question of issue preclusion from the first trial will remain open for subsequent determination in a later case.

Having concluded that the vacated *Amos* judgment can have preclusive effect, and that the district court correctly so decided in this case, we now consider whether the district court abused its discretion by applying collateral estoppel from the vacated judgment to resolve issues of liability and punitive damages.

C. Application of Collateral Estoppel

We review a district court's decision to apply collateral estoppel for abuse of discretion. *Davis & Cox*, 751 F.2d at 1519. We will not disturb a district court's exercise of that discretion unless we have " 'a definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " *Robi v. Five Platters, Inc.*, 838 F.2d 318, 329 (9th Cir. 1988) (quoting *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir.1985)).

A district court should not apply offensive collateral estoppel if to do so would be unfair to the defendant.[2] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979); *see also Eureka Fed. Sav. & Loan Ass'n v. American Casualty Co.*, 873 F.2d 229, 234 (9th Cir.1989). In

[2] Offensive collateral estoppel arises when "the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery*, 439 U.S. 322, 326 n. 4, 99 S.Ct. 645, 649 n. 4, 58 L.Ed.2d 552 (1979).

Eureka Fed. Sav. & Loan, we held that collateral estoppel was not available to resolve issues in a subsequent case when the issues actually litigated in the earlier case were different. 873 F.2d at 233. Following this holding, we commented in *Eureka Fed. Sav. & Loan* that the district court in the earlier case "may have reached an erroneous conclusion" and we implied it might be unfair to apply collateral estoppel in such a circumstance. *Id.* at 234. We have also stated, however, that even though a case may have been "decided incorrectly, this is an insufficient basis to defeat the application of collateral estoppel." *Peck v. Commissioner*, 904 F.2d 525, 529 (9th Cir. 1990); *see also Starker v. United States*, 602 F.2d 1341, 1347 n. 3 (9th Cir.1979).

We conclude that it was not unfair to the defendant Unocal to apply collateral estoppel against it from the *Amos* judgment, even though that judgment may not be free from legal error.

Assuming Unocal is correct in arguing that the *Amos* judgment is not free from legal error, the way to correct that error was by appeal in the *Amos* case. Unocal elected not to pursue that appeal. Instead, it caused that appeal to be dismissed and traded the uncertainty of an affirmance or reversal for the known result of a settlement. As part of the settlement, Unocal obtained vacatur of the district court judgment but did not ask the court to balance the *Ringsby* factors and make a decision as to the judgment's preclusive effect. In so doing, it took a calculated risk. Judge Panner recognized this in his opinion filed in this case:

> During the settlement negotiations, Unocal was acutely aware of the risk that the *Amos*

> judgment might haunt it despite the settlement. In its brief to the Ninth Circuit in support of the motion to remand, Unocal cited the possibility that a stranger to the litigation may assert offensive collateral estoppel in a second suit. In its brief in support of the motion to vacate, Unocal argued that its reason for conditioning the settlement on vacatur was to avoid the potential preclusive effect of the *Amos* judgment in a later action.
>
> However, Unocal also recognized that vacatur would not eliminate the risk of future collateral estoppel.

Unocal could have conditioned the dismissal of its appeal and settlement of the *Amos* case not merely on vacatur, but on vacatur following the district court's consideration of the *Ringsby* factors and determination that the judgment would not have preclusive effect. Unocal chose not to be so particular about the vacatur it obtained. The risk it assumed by this course of action included the risk that collateral estoppel from the judgment could be used against it even as to those issues which may have been resolved erroneously against it in the trial of the *Amos* case.

We do not criticize Unocal's litigation strategy. It was not unreasonable for Unocal to get the $8 million *Amos* judgment settled, avoid the possibility of an affirmance of that judgment on appeal, and take its chances on what preclusive effect the *Amos* judgment might have if other suits were filed against it by other dealers. By getting the *Amos* judgment vacated, even without the district court's consideration of preclusion under *Ringsby*, Unocal obtained vacatur as an additional weapon to use in arguing against

preclusion in a later case—a weapon it would not have had if the *Amos* judgment had not been vacated or had been upheld on appeal.

We conclude that the district court did not abuse its discretion when it applied collateral estoppel from the vacated *Amos* judgment to resolve the liability and punitive damage issues in this case.

D. Fraud and Punitive Damages

Unocal next contends the district court's punitive damage award based on the fraud claim was erroneous because Oregon requires an award of actual damages to support an award of punitive damages and the jury did not award the plaintiffs any actual damages on their fraud claim. We reject Unocal's argument because the jury in this case did award economic damages to each of the plaintiffs. This award supports the district court's punitive damage award.

E. Due Process and Punitive Damages

Unocal argues the award of punitive damages violated due process because the *Amos* judgment and the judgment in this case imposed successive awards of punitive damages on Unocal, punishing it twice for the same conduct.

We reject this argument. It proceeds from a false premise. Although a jury awarded punitive damages in the *Amos* case, the judgment in that case was appealed and the case was settled. Whether the settlement included the payment of any punitive damages is a matter of conjecture. The only punitive damage sum for which Unocal is liable according to the record before us is the punitive damage award in this case.

CONCLUSION

We affirm the district court's determination that offensive collateral estoppel was available for application in the present case based upon the vacated *Amos* judgment. We also affirm the district court's application of collateral estoppel to establish Unocal's liability and to fix the amount of punitive damages.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 88-0280-PA

CHARLES D. BATES, *et al.*,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA,
doing business as UNOCAL, a foreign corporation,
Defendants.

ORDER

[Filed Mar. 16, 1989]

Plaintiffs' motion for partial summary judgment on the application of offensive collateral estoppel is GRANTED. Defendant's motion for reconsideration or in the alternative for certification for immediate appeal is DENIED.

DATED this 15th day of March, 1989.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 88-0280-PA

CHARLES D. BATES, *et al.*,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA,
doing business as UNOCAL, a foreign corporation,
Defendants.

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OPINION

[Filed Mar. 16, 1989]

PANNER, J.

Plaintiffs, a group of Unocal gasoline retailers, bring this action against defendant Union Oil Company (Unocal), for breach of contract, tortious interference with business relations, breach of implied covenant of good faith and fair dealing, fraud, and breach of fiduciary duty. Plaintiff moves for partial summary judgment based on offensive collateral estoppel from *Amos v. Unocal*, No. 86-1007-PA (D. Or.)

I granted plaintiffs' motion at oral argument on December 16, 1988, and indicated an opinion would follow. Unocal moves for reconsideration, or in the alternative, for certification for an immediate appeal under 28 U.S.C. § 1292(b). I deny these motions.

PROCEDURAL BACKGROUND

In *Amos*, a group of Unocal retailers brought an action against Unocal based on the same conduct as alleged in this case.[1] Five claims went to the jury: breach of implied covenant of good faith and fair dealing, fraud, tortious bad faith and unfair dealing, tortious interference with business relations and breach of express contract.

These claims, as the claims in this case, arose from events in 1985 and 1986. At that time, Unocal had positioned its gasoline in the market as a high quality product at a premium price. It was selling leaded

[1] There is one exception. In this case, plaintiffs claim that Unocal made and breached a contract to pay them the same amount as the *Amos* plaintiffs received.

premium gasoline and 89 octane unleaded gasoline, not available elsewhere.

First, in September, 1985, Unocal suddenly changed the octane of its unleaded gasoline from 89 to 87, without reducing the price. This change was in the Pacific Northwest only. There was evidence that Unocal reduced the quality of the gasoline in the Northwest so that it could maintain full supplies of higher octane product in California, a more profitable market.

In April, 1986, Unocal officially discontinued selling premium gasoline and substituted unleaded premium. It delivered unleaded premium to dealers in February, 1986, but labeled and invoiced it at the higher leaded premium price. In early March, 1986, Unocal told the Northwest dealers that the change to unleaded premium would be made, and that their tanks would need flushing. The dealers were not told that the change had already been made until late March, 1986.

There was evidence that Unocal recognized and ignored the risk of a dramatic loss of business due to the product changes, but did not lower its prices to remain competitive. Rather, it urged dealers to sell at or below cost, relying on a Unocal rebate program that rewarded volume growth.

Unocal had been aggressively promoting and advertising its 89 octane product, but did not advertise the changeover to 87 octane. There was evidence that the dealers suffered complaints and loss of business from Northwest customers whose cars did not perform as well with lower octane gasoline. There was evidence of customer confusion about paying higher prices for

products available elsewhere at substantially lower prices.

The *Amos* jury returned a verdict of $7.6 million on the claims for breach of implied covenant of good faith and fair dealing, fraud, and tortious bad faith and unfair dealing. The jury lost [sic] profits, emotional distress damages ($15,000 for each plaintiff) and punitive damages ($120,000 for each plaintiff). Unocal moved for a judgment notwithstanding the verdict, a new trial, or remittitur. I denied these motions.

Unocal filed a notice of appeal. While the appeal was pending, the parties began settlement negotiations before Judge Edward Leavy. The parties agreed to settle the case on a number of conditions. The condition pertinent to this case was that I vacate the judgment in *Amos*. The Ninth Circuit remanded so that I could entertain a stipulated motion for vacatur. I granted the motion and vacated the final judgment.

During the settlement negotiations, Unocal was acutely aware of the risk that the *Amos* judgment might haunt it despite the settlement. In its brief to the Ninth Circuit in support of the motion to remand, Unocal cited the possibility that "a stranger to the litigation may assert offensive collateral estoppel in a second suit. . . ." (Cummings Decl. Ex. E at 5.) In its brief in support of the motion to vacate, Unocal argued that its reason for conditioning the settlement on vacatur was to avoid the potential preclusive effect of the *Amos* judgment in a later action.

However, Unocal also recognized that vacatur would not eliminate the risk of future collateral estoppel. In a settlement document, Unocal said "[w]e recognize that it is unlikely that either Circuit

Judge Leavy or District Judge Panner could enter an order absolutely precluding any risk of collateral estoppel if the present case is settled." (Cummings Decl. Ex. D at 8.) Further, in its brief on the motion for remand, Unocal said it understood that a remand would not be an expression of the Ninth Circuit's view on allowing offensive collateral estoppel from a settled case.

My order of vacatur says nothing about the preclusive effect of the *Amos* judgment, nor does it indicate my opinion on it. I vacated the *Amos* judgment so that the parties would settle the case.

Unocal's fears of offensive collateral estoppel have materialized. Another group of dealers brought an action based on the same facts as *Amos*. By motion for summary judgment, these plaintiffs see to estop Unocal on the claims tried to verdict in *Amos*.

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate if the pleadings and supporting materials show no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. Offensive Collateral Estoppel

Offensive collateral estoppel prevents a defendant from relitigating issues previously litigated and lost against another plaintiff. *Parlane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1978). A trial court has broad discretion in determining when to apply offensive collateral estoppel. *Parklane*, 439 U.S. at 331. The court should not apply collateral estoppel:

> [w]here a plaintiff could easily have joined in the earlier action or where . . . the application of offensive collateral estoppel would be unfair to a defendant.

Id.

Among factors to consider in deciding whether to apply offensive collateral estoppel are: the ease of the plaintiff in joining the earlier action; the defendant's opportunity to litigate the same issue fully and fairly in the earlier proceeding; conservation of judicial resources; fairness to the defendant; availability of procedural opportunities that were unavailable in the prior action and might be likely to cause a different result; and the existence of prior inconsistent judgments for the defendant. *Id.* at 331-32.

There is a split of authority on whether federal or state law applies to determine whether to allow offensive collateral estoppel. *See, e.g., Held v. Mitsubishi Aircraft Int'l Inc.*, 672 F.Supp. 369, 386-87 (D. Minn. 1987). However, the outcome here would be the same under federal or state law. *See, e.g., Bahler v. Fletcher*, 257 Or. 1, 474 P.2d 329 (1970).

DISCUSSION

Plaintiffs' motion presents no issue of fact. The question before me is purely the legal question whether to allow the use of offensive collateral estoppel.

Offensive collateral estoppel is best applied sparingly, because of the risks that the Supreme Court pointed out in *Parklane*. The *Parklane* list of factors to consider is not exhaustive, and the circumstances of each case must guide the use of collateral estoppel. *Western Oil and Gas Ass'n v. United States E.P.A.*, 633 F.2d 803, 809-10 (9th Cir. 1980). However, the

concern for preventing the problems inherent in the use of offensive collateral estoppel serves as guidance. There are two general types of problems to consider.

First, offensive collateral estoppel should not be fundamentally unfair to the defendant. *Parklane* mentions circumstances of unfairness to a defendant. For example, the defendant may not have had a strong incentive to defend vigorously in the first action. There may be procedural opportunities in the later action that were unavailable previously, which could change the result. There may have been other judgments in defendant's favor, so that applying a single adverse judgment against it would be unfair. *Parklane*, 439 U.S. at 321-22. Second, potential plaintiffs should not be permitted to "wait and see" on the sidelines, hoping to benefit from a judgment against the defendant, while avoiding the risks of an unfavorable outcome. *Id.* at 330.

The Supreme Court found that the resolution of these problems is best left to the trial court's broad discretion. *Id.* at 331. I have considered the *Parklane* factors and the underlying purposes of offensive collateral estoppel. This case warrants the use of offensive collateral estoppel.

To relitigate precisely the same factual issues as in *Amos*, after a full and fair jury trial, would be a waste of judicial resources, a waste of litigants' resources, and unfair to plaintiffs. I also cannot ignore the valuable time and energy of the jurors, who should not be asked to duplicate the efforts of their *Amos* predecessors under these circumstances.

I. Ease of Joinder

In *Parklane*, the Court made it clear that potential plaintiffs should not be encouraged to allow others to

carry the litigation risk, and jump in after their precedessors get a favorable judgment to recover a judgment of their own. This would encourage rather than discourage litigation, because a potential plaintiff would have nothing to lose and everything to gain by declining to join a first action. 439 U.S. at 330.

The Ninth Circuit has interpreted the "ease of joinder" test not to require speculation about plaintiffs' motives for not joining. Rather, plaintiffs must not have been "eluding the binding force of an initial resolution of a simple issue." *Starker v. United States*, 602 F.2d 1341, 1349-40 (9th Cir. 1979) (*Starker II*).

Plaintiffs are virtually identically situated to the *Amos* plaintiffs. They were aware of *Amos* as it was being litigated. Some followed *Amos* closely. Some were directly asked to join *Amos* and declined. However, some plaintiffs, through their affidavits, say that they were subjected to pressure by Unocal representatives not to join in *Amos*. Some claim they were induced not to join *Amos* by promises that they would receive what the *Amos* plaintiffs received. Further, some plaintiffs contend that they felt threatened with the loss of their Unocal dealerships if they joined *Amos*.

Unocal says that plaintiffs had every opportunity to join *Amos* and deliberately declined. It denies using threats, promises or intimidation. However, Unocal employees admit to discouraging some plaintiffs from joining *Amos*. (Breen Depo. at 27; Armstrong Depo. at 36.)

The evidence in *Amos* showed that Unocal wields substantial economic power over its dealers, and the dealers have virtually none. Some plaintiffs in *Amos* and this case have invested their family funds in

their dealerships, have family members as partners or employees, and had a great deal to lose personally if their dealerships were terminated. It is clear that it would not have been "easy" or risk-free for plaintiffs to join. They did not adopt a "wait and see" attitude strictly to avoid the risk of an adverse determination.

II. Unfairness to Unocal

The Supreme Court emphasized the importance of fairness to the defendant. *Parklane*, 439 U.S. at 330. Although fairness in the context of offensive collateral estoppel generally concerns the defendant's opportunity to litigate the case fully and fairly, I do not restrict my analysis to that consideration, especially in light of the procedural history of the case.

Having precided over the entire *Amos* case, including the trial, I have no doubt that Unocal not only had the opportunity to litigate fully and fairly, but did litigate vigorously. Unocal prevailed before the jury on two of five claims. It simply lost on the others. Unocal had excellent counsel throughout *Amos*. There was a great deal at stake and every incentive to litigate fully. The trial was fair and proper.

Unocal now insists that, had it not opted to settle, it would have prevailed on appeal. Therefore, it argues, it had no opportunity to show that errors at trial denied it an opportunity to litigate fully and fairly.

I do not agree that there were errors at trial. Even if there were errors, speculation about an appeal that Unocal voluntarily abandoned, while fully aware of the potential legal effect, does not make collateral

estoppel unfair. Unocal was not forced to abandon its appeal. Unocal cites no case, nor have I found one, that says full and fair opportunity means litigated to the final available appeal.

Unocal's fairness arguments boil down to a simple implication. Unocal implies that because it voiced its concern about the future preclusive effect of *Amos* when it asked me to vacate the *Amos* judgment, it is unfair to apply offensive collateral estoppel now. As plaintiffs aptly noted at oral argument, Unocal is suggesting we had a deal. Even if such a deal could have been made, which Unocal admitted was impossible, nothing indicates that it was.

Unocal also argues that a prior verdict in *Unocal v. Modrich*, No. 86-6125-ME (D. Or.) is inconsistent with the *Amos* verdict. I disagree, as did Unocal's counsel in *Modrich*.

At a pretrial conference,, referring to *Modrich*, Unocal's counsel said to me:

> You don't know this and it hasn't been put in the record thus far, but in December of this year an *identical case with identical issues* was litigated before Judge Hogan which resulted in a defense verdict for Unocal.

(Pl. Memo in Opp. to Motion for Reconsideration, Ex. 1 at 20) (emphasis supplied). I have examined the record in *Modrich*, a contract by Unocal action against a dealer. The dealer counterclaimed for fraud. The *Modrich* counterclaim bears no relevant resemblance to *Amos* or this case.

In trying to persuade Magistrate Hogan not to permit Modrich to use collateral estoppel from *Amos* against Unocal in *Modrich*, Unocal's counsel wrote:

> Michael Modrich's price claim is not co-extensive with the price claim of the plaintiffs in *Amos* . . . as his claim is from January 1, 1986 through March 11, 1986.
>
> *Since there is no identity of issues, defendant Michael Modrich should not be able to claim the benefits of collateral estoppel.*

(Pl. Memo in Opp. to Motion for Reconsideration, Ex. 3 at 3) (emphasis supplied.)

I find no unfairness in applying offensive collateral estoppel against Unocal. To rule otherwise would be unfair to the court system, plaintiffs, and the jury.

III. Effect of the Vacated Judgment

The only factor that could distinguish this case from the ideal offensive collateral case is that the final judgment in *Amos* was vacated. The effect of a vacated judgment on collateral estoppel was addressed in *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983). The parties have cited no Supreme Court or Ninth Circuit authority directly on point, and I have found none.

In *Chemetron*, a prior case settled after a jury verdict, but before entry of a final judgment. The plaintiff sought to estop the defendant based on the prior case. The question before the *Chemetron* court was whether the prior case had been litigated to finality, a requirement for applying any form of collateral estoppel. After a thorough review of the law on the question, the court held that "the finality requirement does not necessarily demand the ministerial act of

executing a judgment." 682 F.2d at 1191. I agree with the *Chemetron* court that to require a final judgment after a jury verdict as a condition of applying collateral estoppel would elevate form over substance. *Id.*

Unocal argues three points in opposition to the application of the *Chemetron* collateral estoppel doctrine. First, it notes Judge Reavley's dissent in *Chemetron*, which severely criticizes the majority's reasoning as contrary to the interest in settlement. 682 F.2d at 1200-03. Second, Unocal argues that *Chemetron* has no precedential effect because it was vacated and remanded.[2] Finally, Unocal argues that giving preclusive effect to the *Amos* verdict would contradict the strong public interest in settlement by discouraging a defendant from settling after a verdict, if there is a potential plaintiff waiting in the sidelines. Unocal cites two law review articles in support of this theory. Zeller, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 Yale L.J. 869 (1987); Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 Ill. L. Rev. 731 (1987).

None of these arguments rely on authority that has precedential effect on this court. Nevertheless, I address them because of the serious public policy concerns that they raise. The interest in settlement is one that every trial judge confronts daily. I do not

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[2] *Chemetron* was vacated on other grounds. It has no precedential effect. *See Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239, 242 (5th Cir. 1988); *Avondale Shipyards, Inc. v. Insured Lloyds*, 786 F.2d 1265, 1273 n.11 (5th Cir. 1986). However, the collateral estoppel reasoning has never been expressly disavowed or overruled.

dismiss it lightly, but consider it as a factor to balance against an equally strong interest in finality.

Settlement and finality are not countervailing considerations. At their core is the common concern for preventing needless litigation and the waste of the court's, the litigants', the jurors', and the public's resources. In this case, this concern is served by preventing rather than allowing relitigation.

The *Chemetron* collateral estoppel doctrine has never been squarely addressed by the Ninth Circuit, nor has it ever been squarely rejected by any other circuit. The implications of the *Chemetron* approach have not escaped the courts. *See, e.g., Nestle Co. v. Chester's Market*, 756 F.2d 280, 281 (2nd Cir. 1985) (district court abused its discretion by refusing to vacate its judgment after remand for settlement purposes because finality of judgments and the public interest outweighed the interest in settlement); *Federal Data Corp. v. SMS Data Prods. Group*, 819 F.2d 277 (Fed. Cir. 1987); *Armster v. United States Dist. Court for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1350 n.2. (9th Cir. 1986).

I recognize the potential chilling effect that the preclusive use of a vacated judgment after a jury verdict could have on settlement. However, in this case, I balance that potential against Unocal's ability to settle at any time before a verdict. Rejecting collateral estoppel could have a chilling effect on settlement of *this* case. Prohibiting collateral estoppel under these circumstances could encourage *defendants* to "wait and see" and avoid settlement until after a verdict.

The integrity of the verdict is not in question. Unocal has exhausted its challenges to the verdict in

this court by motions for a directed verdict and judgment notwithstanding the verdict, new trial or remittitur. All these motions were denied. The jury has found facts against Unocal. Vacating the judgment, a ministerial act required to close a case after a jury verdict, has no effect on the finality of the jury's findings of facts. The factual issues I find collaterally estopped were fully and fairly litigated before the trier of fact.

III. Motion for Reconsideration or Certification for Immediate Appeal

Unocal moves for reconsideration, or in the alternative an order certifying the collateral estoppel question for immediate appeal under 28 U.S.C. § 1292(b). I deny the motion for reconsideration for the reasons stated in this opinion. I deny the motion for certification for immediate appeal because it would not materially advance the ultimate termination of this litigation.

Section 1292(b) permits an immediate appeal where: 1) there is a controlling question of law; 2) there is a substantial ground for difference of opinion; and 3) the immediate appeal may materially advance the ultimate termination of the litigation. The first two factors are present. The third is not.

After my ruling on collateral estoppel, I indicated that the only questions left for trial are the amounts, if any, of lost profits, emotional distress, and punitive damages. Plaintiffs have stipulated that the only claims that will be tried for damages are those identical to the claims in *Amos*, for the same time period as in *Amos*.

In this case, damages for any claims not identical to the *Amos* claims for the same time period cannot not be greater than the damages for the *Amos* claims. Therefore, if my collateral estoppel ruling is upheld on appeal, plaintiff cannot recover additional damages beyond what it is awarded at a trial on damages. There will be no need for a retrial. This case will be brought to an end when all appeals are exhausted. Naturally, if my collateral estoppel ruling is reversed on appeal, the entire case will have to be retried on liability and damages.

If my collateral estoppel ruling is correct, certification of this decision for immediate appeal would preclude the most efficient and expeditious disposition of this case. To conclude otherwise, I would have to believe that my ruling is wrong and the case would be remanded for a full trial.

Without an immediate appeal, a relatively short trial on damages can take place without further delay. This trial may advance the ultimate termination of the litigation. An immediate appeal will not advance the conclusion of this litigation. I deny Unocal's motion for certification for immediate appeal.

CONCLUSION

I grant plaintiffs' motion for partial summary judgment on the application of offensive collateral estoppel. I deny Unocal's motion for reconsideration or in the alternative for certification for immediate appeal. I order that the case be tried on the issues of lost profits, emotional distress, and punitive damages. The jury will be instructed of the *Amos* jury's

findings of fact and award, based on the verdict forms from *Amos*.

IT IS SO ORDERED.

DATED this 5 day of March, 1989.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 86-1007PA

EVERETT L. AMOS, DALE BAKER, *et al.*,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA,
dba UNOCAL, a California corporation,
Defendants.

ORDER

[Filed Feb. 16, 1988]

The Court is advised that plaintiffs and defendant Union Oil Company of California ("Union") have agreed to settle this litigation upon the condition that this Court, acting pursuant to F.R.Civ.P. Rule 60(b), vacate the final judgment herein and enter a new order and final judgment reflecting this settlement.

Union's motion to this effect under Rule 60(b) has been lodged with and considered by the Court, and when jurisdiction is restored to the Court, it is willing to entertain and grant the motion.

Dated: 2/16, 1988.

/s/ Owen W. Panner
OWEN W. PANNER
Chief Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-4265
87-4365

DC# CV-86-1007-PA
Oregon (Portland)

EVERET L. AMOS, *et al.*,
Plaintiffs-Appellees,

vs.

UNION OIL COMPANY OF CALIFORNIA,
d/b/a UNOCAL, a California corporation,
Defendant-Appellant.

ORDER

[Filed Feb. 24, 1988]

Appellant's motion for a limited remand to allow the district court to rule upon a motion under Fed. R. Civ. P. 60(b) is granted. This case is remanded for 30 days from the entry of this order or until the district court rules on the motion, whichever occurs first. Within 14 days after expiration of the remand, appellant shall file a motion or stipulation for voluntary dismissal of these appeals or submit a status report to the conference attorney.

The briefing schedule established by the order entered December 14, 1987, as amended February 4, 1988, is vacated.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of entry of the order.

FOR THE COURT:

/s/ Susan M. Johnson
SUSAN M. JOHNSON
Conference Attorney

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. CV 86-1007PA

EVERETT L. AMOS, DALE BAKER, *et al.*,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA,
dba UNOCAL, a California corporation,
Defendants.

ORDER AND FINAL JUDGMENT

[Filed Feb. 29, 1988]

Upon motion of defendant and the stipulation of plaintiffs, the Court being advised that the parties have agreed to settle this litigation, and good cause appearing

1. It is hereby ORDERED, pursuant to F.R. Civ. P. Rule 60(b)(5), (6), that the final judgment in this cause, entered June 30, 1987, shall be and is hereby vacated and set aside in its entirety; and

2. It is further ORDERED, ADJUDGED, AND DECREED that plaintiffs' complaint and amended complaint shall be and hereby are each dismissed with prejudice, that plaintiffs and each of them shall have and recover no relief of any kind against defendant,

and that each party bear his, her, or its own costs of suit.

DATED: 2/24/, 1988

/s/ Owen W. Panner
OWEN W. PANNER
Chief Judge
United States District Court

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-35199

D.C. No. CV-88-0280-PA

CHARLES D. BATES; CHRISTINE A. BATES; BELLINGER BROTHERS; ALLEN P. BELLINGER; HUGH E. BELLINGER; MARILYN H. BELLINGER; WINEFORD E. BENNETT, *et al.*,

Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, doing business as UNOCAL, a foreign corporation,

Defendant-Appellant.

ORDER

[Filed Dec. 2, 1991]

Before: WRIGHT, FARRIS and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Farris and Thompson have voted to reject the suggestion for rehearing en banc, and Judge Wright has so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

(2)

No. 91-1384

Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

CHARLES D. BATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held in a diversity case that Oregon law permits a prior vacated judgment to be given collateral estoppel effect.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1384

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. Respondents in this diversity case are 25 Union Oil of California (Unocal) dealers, who owned or operated gas stations in Oregon. Respondents were damaged when Unocal switched their supply of unleaded regular gasoline from 89 octane to 87 octane, and substituted unleaded premium gasoline for leaded premium gasoline, without informing them or the public of these changes. Respondents alleged that these actions constituted fraud, breach of contract, and tortious breach of the duty of good faith and fair dealing, and sought economic, general and punitive damages.[1]

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[1] Unocal incorrectly states that total of the *Bates* judgment was $8 million; it was approximately $3.6 million. ER 303-374.

Essentially the same claims had been brought by 45 Unocal dealers in a prior case. *Amos* v. *Union Oil Co. of Cal.*, 663 F. Supp. 1027 (D. Or. 1987). Following a 12-day trial, the jury in *Amos* awarded the Unocal dealers economic, general and punitive damages.

After Unocal appealed, settlement discussions ensued before Judge Edward Leavy of the United States Court of Appeals for the Ninth Circuit. Unocal recognized that, if it settled the *Amos* case, it ran the risk of subsequent plaintiffs asserting collateral estoppel. ER 108.[2] Nevertheless, a tentative settlement was reached, conditioned upon the district court vacating the *Amos* judgment. The terms of this settlement are not contained in the record.

Following the tentative settlement, Unocal filed a motion and brief in the district court seeking assurances that the *Amos* judgment would be vacated if the case settled. ER 116, 119 *et seq.* In Unocal's brief, it reiterated its concern about the use of offensive collateral estoppel if the *Amos* case settled. Unocal did not, however, ask the Court to undertake any inquiry into whether the judgment should be denied preclusive effect in subsequent suits as required by *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982).[3] Instead, it simply requested the court to grant the motion under Fed.R.Civ.P. 60(b). The district court order indicating that it would grant vacatur simply stated that the motion would be granted pursuant to Rule 60(b) and did not address the *Ringsby* factors or the future preclusive effect of the vacated judgment. ER 114.

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[2] "ER" refers to appellant's Excerpts of Record in the Court of Appeals.

[3] Since 1982, the rule in the Ninth Circuit has been that when a case is settled pending appeal from a judgment in favor of a plaintiff, a decision to grant vacatur may be made by the district court only after balancing "the competing values of finality of judgment and right to relitigation of unreviewed disputes . . . ." *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982).

Unocal then asked the Ninth Circuit to remand the case to the district court. ER 111. Unocal acknowledged in its motion that vacatur might not preclude the judgment from being given collateral estoppel effect in a subsequent lawsuit. ER 113. On February 29, 1988, the district court vacated the *Amos* judgment. ER 122. The *Ringsby* balancing analysis was never performed.

2. Against this backdrop, the *Bates* plaintiffs (respondents herein) filed an action against Unocal in the United States District Court for the District of Oregon, raising identical claims to those litigated by the *Amos* plaintiffs. The case was assigned to the same judge who had presided over the *Amos* trial, Chief Judge Panner.

Plaintiffs moved for partial summary judgment, seeking collateral estoppel against Unocal based on the *Amos* verdict. The district court granted the motion.[4] The court explained that its decision to vacate the *Amos* judgment did not prevent use of collateral estoppel here:

> "My order of vacatur says nothing about the preclusive effect of the *Amos* judgment, nor does it indicate my opinion on it. I vacated the *Amos* judgment so that the parties would settle the case." Pet. App. 18a-19a.

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[4] While the *Bates* case was proceeding to trial and appeal, a third case challenging Unocal's conduct in dealing with its Northwest dealers was filed in the United States District Court for the Western District of Washington, *Houser* v. *Union Oil Co. of Cal.*, No. C88-1233-R (W.D. Wash. Oct. 20, 1989). The *Houser* plaintiffs also sought collateral estoppel based on the *Amos* judgment. On October 20, 1989, the Western District of Washington, the Honorable Barbara J. Rothstein, reached the same conclusion that the district court had reached in *Bates*: Despite the *Amos* settlement, collateral estoppel should be applied against Unocal. *Houser, supra*, ER 226 *et seq.*. Unocal also appealed that case; the Ninth Circuit resolved that case on the same grounds as *Bates*.

Unocal has also filed a Petition for Writ of Certiorari in that case, *Union Oil Company of California* v. *Hamilton, et al.* Unocal raises the identical arguments in that case as it is raising in this case.

Stating that he had not previously balanced the competing interests in deciding whether to vacate a judgment for purposes of possible relitigation, the court did so and concluded that collateral estoppel was appropriate: [5]

> "The interest in settlement is one that every trial judge confronts daily. I do not dismiss it lightly, but consider it as a factor to balance against an equally strong interest in finality.
>
> "Settlement and finality are not countervailing considerations. At their core is the common concern for preventing needless litigation and the waste of the court's, the litigants', the jurors', and the public's resources. In this case, this concern is served by preventing rather than allowing re-litigation. . . ."

3. Unocal filed appeals in both *Bates* and *Houser*. The Ninth Circuit ruled that federal law controlled when a judgment should be vacated pursuant to Fed.R.Civ.P. 60(b), but that in a subsequent diversity action, "the *forum state's law* applies to determine the preclusive effect of a previous judgment." *Bates*, *supra*, Pet. App. 5a (emphasis added). Since Oregon has not resolved its law on this point, the Ninth Circuit "assumed" that Oregon would apply federal law. *Id.*

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[5] The court separately ordered that certain damages awarded in *Amos* should have collateral estoppel effect in *Bates*. *Bates v. Union Oil Co. of Cal.* Op. of 3/31/89; ER 215, *et seq.*:

> "I cannot overemphasize the fundamental principles for which *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 320 (1979) stands—fairness, judicial discretion to manage caseloads, and conservation of society's resources. . . .
>
> "Federal trial judges have a duty to develop the fairest, most efficient, and innovative procedural tools for handling a heavy and growing caseload. This is not a self-serving goal. It serves society at large, litigants, and juries. That is the guts of *Parklane*, and the purpose of offensive collateral estoppel.
>
> ". . . There is no efficiency or fairness in retrying Unocal's conduct. One jury spent twelve days and found that Unocal committed a serious fraud. To relitigate *Amos* would be wasteful." ER 224-225.

Noting that the problem in the instant case arose because the record failed "to disclose that the [trial] court considered the *Ringsby* factors at the time of vacatur," the Ninth Circuit held that Chief Judge Panner was empowered to confront the question of the preclusive effect of the vacated *Amos* judgment when the issue was raised in *Bates*.[6] Although Unocal argued that it was not responsible for the district court's failure to perform the *Ringsby* balancing, the Ninth Circuit disagreed. The court held that Unocal had taken a "calculated risk" in seeking vacatur without asking the trial court to balance the *Ringsby* factors. Pet. App. 10a. Unocal subsequently filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE PETITION

1. Petitioner Unocal claims that this case presents two issues: (a) Whether under Fed. R. Civ. P. 60(b) parties settling a case on appeal may require the district court judgment to be vacated; and, (b) Whether a vacated judgment may be accorded collateral estoppel effect. Unocal argues that the Ninth Circuit has analyzed these issues differently than other circuits, and that this case is therefore worthy of review.

Unocal's analysis is totally misplaced. The Rule 60(b) issue is clearly not before this Court for the simple reason that *petitioner moved* to have the judgment vacated and it was vacated. The fact that the judgment might

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[6] The court of appeals stated:

> "[T]he rule we adopt today encourages the party seeking vacatur to call to the district court's attention the requisite *Ringsby* factors at the time vacatur is sought. The District Court can then perform the balancing task according to *Ringsby* and decide whether to vacate the judgment. If the court does not consider *Ringsby* in granting or denying the motion to vacate, the question of issue preclusion from the first trial will remain open for subsequent determination in a later case." *Bates, supra*, Pet. App. 8a-9a.

not have been vacated in some other court hardly provides any basis for petitioner to obtain review of the decision in its favor. Simply stated, petitioner has nothing more than an academic interest in the "conflict in the circuits" it identifies concerning the proper way to interpret Rule 60.

Petitioner attempts to avoid this problem by linking the Rule 60(b) issue of vacatur with the completely distinct question of the collateral effects of the vacated judgment. While the decisions analyzing the Rule 60(b) issue are animated by the issue of preclusive effect, the questions remain separate. This is best demonstrated by the fact that the issue of vacatur is a question of federal law and the issue of preclusive effect is a matter of state law.[7] Properly analyzed therefore, the first issue is simply whether Rule 60(b) relief was appropriate in this case, a matter—once properly severed from collateral estoppel—of no practical importance to petitioner.

Petitioner's second issue concerning collateral estoppel is clearly unworthy of review by this Court because the question whether a vacated judgment nevertheless can be accorded collateral estoppel effect in a diversity action is purely a question of state law. Indeed, Unocal argued at the court of appeals that Oregon law governed this issue. Opening Brief for Appellant at 32-34, *Bates* v. *Unocal*, *supra*.[8] For more than a decade it has been clear that

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[7] What makes the petitioner's complaint about the issue particularly hollow is that petitioner was completely aware of the problem at the time it entered into the *Amos* settlement. It is simply not possible for any federal court in a diversity action to guarantee that a vacated judgment will not be given preclusive effect by a subsequent state court (or federal court sitting in diversity). Thus, Petitioner took a "calculated risk" in settling the *Amos* cases while on appeal. Petitioner received the full benefit of its bargain with those plaintiffs and it received all of the relief to which it was entitled from the district court.

[8] Petitioner has not sought review of the Ninth Circuit's holding that the preclusive effect of a previous judgment in a diversity

this Court has no "interest in reviewing diversity cases where the only issue is the consistency of the court of appeals decision with applicable state substantive law," which, properly analyzed, is precisely what is at issue here. R. Stern, et al., *Supreme Court Practice* 212 (6th ed. 1986).

The actual holding of the Ninth Circuit in this case is that Oregon law would preclude relitigation by petitioner of the issues finally decided in *Amos*. To be sure, there are statements in the court's opinion regarding the court's view of the proper federal rule of estoppel, but those statements in this diversity action are merely *dicta* and it is well settled that this Court reviews judgments not opinions. See, *e.g.*, *Chevron U.S.A., Inc.* v. *National Resources Defense*, 467 U.S. 837, 842 (1984); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-98 (1956).

2. Even if the issues identified by petitioner were in fact before the court, those issues would not warrant review. The importance of the Rule 60(b) issue is exaggerated by petitioner and seems to be clearly a matter that may never need a uniform answer and certainly does not require one from this Court now. The decision of the Ninth Circuit in this case is just a technical response to a unique problem created by Unocal's actions that almost certainly will never recur. The Ninth Circuit, in *Ringsby*, *supra*, 686 F.2d at 722, stated that a district court may grant vacatur, but only after balancing "the competing values of finality of judgment and right to relitigation of unreviewed disputes." When it sought vacatur, Unocal failed to request the district court to perform the balancing test *Ringsby* requires. Unocal took "a calculated risk" both that judges in future cases would look no further than the act of vacatur itself and

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action is governed by "the forum state's law." *Bates*, *supra*, 944 F.2d at 649; Pet. 5a. To the contrary, petitioner misleadingly asserts that "the court first concluded that the preclusive effect of the *Amos* judgment is governed by federal law." Pet. 6.

that State law would permit relitigation and thereby deny preclusive effect to the *Amos* judgment. Pet. App. 10a. Unfortunately for Unocal, the very same trial judge heard the subsequent case. Chief Judge Panner knew that he had never been asked to bar the preclusive effect of the *Amos* judgment. He also concluded that collateral estoppel was appropriate *under Oregon law*, and proceeded to apply it. Pet. App. 20a.

When Unocal appealed, the Ninth Circuit was presented with a narrow issue: who should bear the burden when Ninth Circuit procedures for granting vacatur are not followed? The Ninth Circuit placed the burden on the party seeking vacatur, requiring it "to call to the district court's attention the requisite *Ringsby* factors at the time vacatur is sought." Pet. App. 8a. Unocal's challenge to the Ninth Circuit's resolution of this procedural issue is simply not worthy of this Court's review.

The Ninth Circuit concluded that the procedure it required to vacate a judgment and to ensure that the judgment is not given preclusive effect had not been followed. It further held that Unocal, as the party seeking the benefits of vacatur, was responsible for ensuring that the Ninth Circuit's procedural requirements were followed. Unocal's unwillingness to accept responsibility for its own desire to have it both ways causes it to suggest in this Court that it was "tricked," "bamboozled," and subjected to "judicial ambush" by Chief Judge Panner. Pet. 21, 25, 26. Even if Unocal's view is accepted, this surely makes this case unlikely to recur, and therefore not appropriate for review by this Court.

In fact, however, the district court's view plainly was that judicial economy favored the application of offensive collateral estoppel to avoid permitting Unocal, at great public expense , to retry the exact same case it had tried in *Amos*. Those conclusions, rather than trickery, were the court's motive. The Ninth Circuit deemed the ruling appropriate as a matter of circuit procedure and state

law. That decision is not of broad general application and does not merit this Court's review.

The unique facts presented in this case are unlikely to recur. Settling parties in the Ninth Circuit seeking to avoid collateral estoppel have been clearly told that, at a minimum, it is their responsibility to make a record that vacatur was obtained through the proper procedure. Counsel in the Ninth Circuit have now been told that they cannot win the gamble of creating an inadequate record when securing vacatur in order to cry foul in a later case.

3. Even if the Rule 60(b) issue were properly in this case the issue of vacatur is not a matter of general importance. There are only a few reported decisions on the issue in a ten year period. Six circuits have issued opinions examining the issue.[9] Of the remaining seven circuits, Unocal identifies three[10] that have issued orders requiring vacatur in individual cases. Those orders do not indicate that the issue of vacatur was afforded any detailed analysis, or that these circuits plan to vacate all similar cases. Indeed, a district court in the Tenth Circuit recently declined to vacate a case after settlement pending appeal. *Russell* v. *Turnbaugh*, 774 F. Supp. 597 (D. Colo. 1991).

Unocal suggests that conflicts between the circuits will impede settlements involving "national concerns." Pet. 24. So far as plaintiffs can determine, the issue of

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[9] The District of Columbia, Second, Third, Seventh, Ninth, and Federal Circuits. *In re U.S.*, 927 F.2d 626 (D.C. Cir. 1991); *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985); *Clarendon, Ltd.* v. *Nu-West Indus., Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hosp., Inc.*, 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Federal Data Corp.* v. *SMS Data Prods. Group*, 819 F.2d 277 (Fed. Cir. 1987).

[10] The Fourth, Tenth, and Eleventh Circuits. *Kennedy* v. *Block*, 784 F.2d 1220 (4th Cir. 1986); *First Nat'l Bank* v. *Don Adams Mining Co.*, 844 F.2d 1445 (10th Cir. 1986); *Mur-Maid Enters., Inc.* v. *Townsend*, 951 F.2d 297 (11th Cir. 1992).

whether vacatur obtained in one circuit should be honored by a different circuit with different vacatur rules has *never* arisen. Nor is it presented here.

Moreover, the question of whether Rule 60(b) relief must always be available or not when there is a settlement after judgment does not require a uniform national rule. No primary activity is affected by having different rules in different circuits on this purely procedural issue. All that is important is what the rule is within each circuit. The choice of which rule to follow depends on each court's experience in resolving disputes with multiple claims. A rule allowing vacatur may promote settlements but will allow relitigation; a rule denying vacatur may impede some settlements but may prevent large numbers of other claims from being relitigated.

It is far from clear empirically which is the more efficient system and thus the federal courts likely will benefit from allowing different circuits to follow different courses to permit some form of empirical analysis of the consequences of following different approaches.[11] If this Court were to intervene now and arbitrarily choose one

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[11] Unocal suggests that the *Ringsby* approach impedes settlement of cases on appeal. Pet. 8-10. However, circuit statistical reports do not support this assertion. The settlement rate of the Ninth Circuit, which Unocal claims offers the worst of all possible worlds, appears to be well above average. The Administrative Office of the United States Courts does not keep statistics on the number of cases settled on appeal. However, its 1990 report provides data on the number of private, civil cases terminated pursuant to Fed. R. App. P. 42, which governs voluntary dismissals. Annual Report of the Director of the Administrative Office of the United States Courts for 1990 at 106-08, 124-26. Respondents believe it is fair to asume that most private civil appeals terminated under Fed. R. App. P. 42 are dismissed pursuant to settlement (excluding bankruptcy, prisoner, or administrative appeals and cases terminated by consolidation; these categories of cases are excluded from the totals below). For the twelve regional circuits, the total number of Fed. R. App. P. 42 cases is 2,787, or 24% of the total of 11,469. The Ninth Circuit Fed. R. App. P. 42 cases represent 508, or 31% of its total of 1,635, well above the national average.

course over another, then the benefits of having the circuits serve as laboratories on this issue will be needlessly halted.

Unocal's professed concern for efficiency is at best convenient; Unocal, after all, seeks reversal in this case so that it may try the same facts at least three times instead of once. Unocal's argument seems to be that fairness requires that it be allowed to try the same case before the same judge until it wins, even though it was Unocal's own failure to ask that judge to comply with the requirements of *Ringsby* that caused the court to apply collateral estoppel.

The only reason for this Court to intervene would be to protect a particular litigant in the event that one circuit refused to honor the decision of another to vacate a particular judgment. But petitioner merely speculates about that possibility and it is clear that it has never happened. Moreover, there is no reason to suspect that it ever will. The Rule 60(b) issue itself will not be before the second court, only the collateral estoppel issue. And that issue must be resolved, at least in a diversity case, on the basis of state law. Thus, whatever uncertainty exists, arises from the inability to know what state may be the forum for subsequent litigation or what its rule of law will be.

4. Finally, the approach to Rule 60(b) adopted in *Ringsby* and the federal law *dicta* concerning estoppel by the Ninth Circuit are both sensible and did not prejudice petitioner. Recent commentary, benefitting from the approaches of the various circuits, agrees that the Ninth Circuit approach to vacatur is appropriate. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 642 (1991) (Vacatur motions should be routinely denied, except upon showing of particular prejudice in individual case); Anstaett, Comment, *Is Settlement Conditioned on Vacatur an Option? Should It Be?*,

1991 J. Disp. Resol. 87, 106 (advocating use of Ninth Circuit balancing approach).

This case is unique. Both the district court and the Ninth Circuit concluded that Unocal took a "calculated risk" in settling *Amos* and securing vacatur without following Ninth Circuit precedent or knowing what state law of estoppel might be applied. The primary issue addressed by the district court and the Ninth Circuit was what to do in these unusual circumstances, where Unocal's calculated decision to finesse a grant of vacatur backfired. The Ninth Circuit's conclusion that Unocal bore the responsibility at least to do all that it could to increase the chances that its vacatur was effective under the circuit's own precedents does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

In opposing review of the decision below, respondents do not take issue with any of the fundamental propositions that underlie our petition. They do not deny that the courts of appeals are in conflict on the question whether parties may condition a post-judgment settlement on a vacatur of the judgment that precludes its use as a future source of collateral estoppel. They do not deny that the Ninth Circuit's decision according collateral effect to a vacated judgment is irreconcilable with the holdings of virtually all other courts of appeals that "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). And

they do not deny that this case would have had a different outcome outside the Ninth Circuit: in the Second and Federal (and, we submit, the Fourth, Tenth, and Eleventh Circuits), collateral use of the *Amos* judgment would not have been permitted; in the Third, Seventh, and D.C. Circuits, the *Amos* judgment would not have been vacated in the first place and Unocal would have retained its right to appeal. In these circumstances, where the circuits are split on a recurring issue of great practical importance, the decision below plainly warrants further review.

1. In opposing review of the first question presented in the petition, respondents maintain that Unocal "has nothing more than an academic interest in the 'conflict in the circuits' it identifies" (Br. in Opp. 6) because the *Amos* judgment was in fact vacated. This contention simply misses the relevant point. As the first question itself states, and as we explain in the petition (at 16-17), the meaningful conflict in the circuits concerns the circumstances in which judgments must be vacated in a manner that "eliminate[s] [their] collateral estoppel effects." Pet. i. It therefore is nonsensical for respondents to suggest that the issues of entitlement to vacatur and of the vacated judgment's estoppel effects are "completely distinct." Br. in Opp. 6. In fact, the courts of appeals that grant vacatur upon settlement do so for the express purpose of *eliminating* the judgments' collateral effects (see Pet. 22-23), whereas the courts that refuse to vacate do so to *preserve* the judgments' collateral consequences. See *id.* at 23.[1] Thus,

[1] As the Seventh Circuit recently explained regarding its decision in *In re Memorial Hospital of Iowa County, Inc.*, 862

while the questions of vacatur and estoppel may be theoretically separate (since a vacatur's effect on estoppel would be *felt* in the second case when estoppel was invoked), the courts' understanding of the *effect* of vacatur has dictated their rules on the *grant* of vacatur.

Respondents attempt to obscure this seemingly inarguable proposition here by focusing on the peculiarity of the Ninth Circuit's approach. Alone among the courts of appeals, the Ninth Circuit has held that the questions whether to vacate and whether to accord a vacated judgment collateral effect may be decided at different times; in other circuits, the decision to vacate is itself determinative of the estoppel issue. But the decision below surely should not be shielded from review by the very aberrance of its rule.[2]

F.2d 1299 (1988), which announced that Circuit's rule precluding vacatur upon settlement, "[had] we [vacated the judgment], then—as our opinion made clear—the judgment could not have been used in future litigation. Indeed this was one of the considerations that moved us not to vacate it." *Pontarelli Limousine, Inc.* v. *City of Chicago*, 929 F.2d 339, 340 (7th Cir. 1991).

[2] Respondents suggest that review is not warranted because the opinion below "is just a technical response to a unique problem" created when a district court vacates a judgment without reference to the Ninth Circuit's *Ringsby* factors. Br. in Opp. 7. This is an unduly modest statement of the decision's scope. The court also held, of course, that a judgment does "not lose preclusive effect simply because it was vacated." Pet. App. 8a. And the court implemented its longstanding rule, first announced in *Ringsby*, that the parties are not entitled to effectuate a settlement pending appeal that requires vacatur of the judgment. Indeed, as we explain in the petition (at 24-25), the court of appeals' procedural holding—that the questions of vacatur and of estoppel may be decided at different times—greatly adds to the significance of its decision by chilling the settlement of cases in *other* circuits.

2. Respondents oppose consideration of the second question presented in the petition by asserting that the court below applied Oregon law in determining the collateral effect of the vacated *Amos* judgment; they label as *dicta* the "statements in the court's opinion regarding the court's view of the proper federal rule of estoppel." Br. in Opp. 7. This transparent attempt to insulate the decision below from review is manifestly unsound. The Ninth Circuit did opine that, in a diversity action, the forum state's law determines the preclusive effect of a vacated judgment. Pet. App. 5a. But the court immediately went on to declare that Oregon "would apply *federal* law to determine the preclusive effect of a prior federal judgment," and the court "[t]herefore * * * appl[ied] federal law to determine the preclusive effect of the vacated *Amos* judgment." *Id.* (emphasis added). See *id.* at 6a-12a.[3] This application of federal law was hardly *dicta*. The court's understanding of federal law controlled the outcome here and will be binding in future Ninth Circuit nondiversity cases. And insofar as the court of appeals can be said to have applied state law,[4] it is of course elementary that

[3] Respondents' assertion that the district court "concluded that collateral estoppel was appropriate *under Oregon law*, and proceeded to apply it" (Br. in Opp. 8 (emphasis in original)) is similarly misleading. In fact, the district judge concluded: "There is a split of authority on whether federal or state law applies to determine whether to allow offensive collateral estoppel. * * * However, the outcome here would be the same under federal or state law." Pet. App. 20a. The court's subsequent discussion both of collateral estoppel and of the effect of vacatur looked entirely to federal law. See *id.* at 20a-28a.

[4] In fact, the court below plainly erred in stating that state law determines the preclusive effect of a federal judgment

this "Court may pass on the federal question that has been incorporated in the state law." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 172 (6th ed. 1986). See *Three Affiliated Tribes* v. *Wold*

(even a federal diversity judgment) in a subsequent diversity action. Although this Court has left the issue open (see *Heiser* v. *Woodruff*, 327 U.S. 726, 731-732 (1946)), a "burgeoning majority of federal courts" apply federal rules in diversity cases to determine the preclusive effect of prior federal judgments. *Hunt* v. *Liberty Lobby, Inc.*, 707 F.2d 1493, 1496 (D.C. Cir. 1983). These courts recognize that "it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights." *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962). See, *e.g.*, *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985); *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982); *Held* v. *Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369, 387 (D. Minn. 1987); *Restatement (Second) of Judgments* § 87, comment b, at 317 (1980) ("Some aspects of the rules of res judicata reflect primarily procedural policies. Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. * * * These should be determined by a federal rule"); IA Pt. 2 J. Moore, W. Taggart, A. Vestal, J. Wicker, & B. Ringle, *Moore's Federal Practice* ¶ 0.311[2], at 3179-3182 (1990). We did not expressly challenge the Ninth Circuit's conclusion on this point only because it had no bearing on the outcome below —since the court, after all, did apply a federal rule of preclusion. But the choice of law question, should the Court choose to reach it, plainly is subsumed within the second question presented in the petition. It should be added that respondents are incorrect in stating "Unocal argued at the court of appeals that Oregon law governed this issue." Br. in Opp. 6. In fact, *both* parties were of the view that federal law controlled. Virtually all of Unocal's argument addressed federal law (see Appellant's C.A. Br. 18-32, 34-35); for their part, respondents opined that "[f]ederal law controls this question." Appellees' C.A. Br. 16 n.6.

Engineering, 467 U.S. 138, 152 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979). It therefore is beside the point that the federal question settled below, which otherwise plainly warrants review, was decided in the context of a diversity action.

3. Respondents' suggestion (Br. in Opp. 7-11) that the questions presented in this case are insignificant borders on the silly. Respondents themselves acknowledge (*id.* at 9 & n.9) that the issues here have been addressed in elaborate opinions by no fewer than six courts of appeals; three other circuits have issued shorter published orders or opinions that granted vacatur on the authority of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).[5] Not surpris-

[5] Respondents assert that there is "no[] indicat[ion] that * * * these circuits plan to vacate all similar cases." Br. in Opp. 9. But the courts' invocation of *Munsingwear* suggests that they believe themselves obligated by mootness principles to vacate judgments upon settlement. Indeed, since we filed the petition the Eleventh Circuit has vacated another decision upon settlement. *Baxter Healthcare Corp.* v. *Healthdyne, Inc.*, No. 90-8370 (11th Cir. Mar. 5, 1992). And the Tenth Circuit has recognized that, upon compliance with the terms of a settlement and a request for vacatur, "all disputed issues involved in the pending appeals * * * become moot." *Tosco Corp.* v. *Hodel*, 826 F.2d 948, 948 (10th Cir. 1987). The court therefore has held in such a case that, "under the decisions of the United States Supreme Court in *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983), and in *Great Western Sugar Co. v. Nelson*, 422 U.S. 92 (1979), it is * * * this court's duty to vacate the judgments appealed from as moot." *Id.* (parallel citations omitted). The district court decision cited by respondents (Br. in Opp. 9, citing *Russell* v. *Turnbaugh*, 774 F. Supp. 597 (D. Colo. 1991), app. dismissed, No. 91-1121, 1992 U.S. App. LEXIS 2683 (10th Cir. Feb. 25, 1992)) does not mention the controlling Tenth Circuit precedent and is in fact inconsistent with the "duty" recognized by its court of appeals.

ingly, these published decisions are only the tip of the iceberg, settling the treatment of an issue that arises "often" (*Memorial Hospital*, 862 F.2d at 1300) or "routinely" (*Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127, 129 (3d Cir. 1991)) and typically is resolved by unpublished order. And while respondents purport to see no need for a uniform national rule on the availability and effect of vacatur (see Br. in Opp. 10), they essentially are asking the Court to disregard what they acknowledge to be outcome-determinative differences in the interpretations placed by the lower courts both upon this Court's decisions and upon provisions of federal law. See Pet. 17.[6]

Indeed, respondents implicitly acknowledge the force of one of our principal arguments for review. We noted in the petition (at 23-25) that the Ninth Circuit's rule would allow collateral effect to be

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[6] The statistics invoked by respondents (Br. in Opp. 10 n.11) to demonstrate that the Ninth Circuit's rule has not impeded settlement are less than probative. There is no way to determine how many of the cases that have been voluntarily dismissed were settled during appeal, and thus no way of knowing how the Ninth Circuit's rate of post-judgment settlements compares to that of other courts. At the same time, one would expect the Ninth Circuit to have a far better than average settlement rate, notwithstanding its peculiar *Ringsby* rule, because it is one of the courts of appeals to have established a regularized settlement program. See Pet. 3 n.1, 8-9. Indeed, if even a small fraction of the several thousand cases cited by respondents are affected by the issues here, this case will have very substantial practical importance. And the suggestion (Br. in Opp. 11) that this Court should defer consideration of the issues presented here so that the circuits may "serve as laboratories" is wholly out of place in this case; nine circuits already have passed upon the issue, which is as ripe now for this Court's review as it will ever be.

given to judgments that have been vacated in *other* circuits if (as invariably will be the case) the *Ringsby* factors were not considered at the time of vacatur. Respondents do not deny that the decision below would permit estoppel in such circumstances; they assert only that such a case has not yet arisen. See Br. in Opp. 9-10, 11. But that is no answer: there has been no such case because the Ninth Circuit's rule on the effect of vacatur was first announced in the decision below, and there will not be such a case in the future because no prudent litigant whose suit involves an issue that might recur in the Ninth Circuit ever will enter into a post-judgment settlement conditioned on vacatur. Immediate review of the decision below therefore is imperative.[7]

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[7] Attempting to minimize the importance of the decision below, respondents assert that the preclusive effect of federal judgments "must be resolved, at least in a diversity case, on the basis of state law. Thus, whatever uncertainty exists, arises from the inability to know what state may be the forum for subsequent litigation or what its rule of law will be." Br. in Opp. 11. Even if this observation otherwise had merit it would not militate against review of the decision below, which avowedly involved the application of a federal rule of preclusion. But in any event, as we note above (at 4-5 n.4), most courts do (and *all* courts should) apply federal rules to determine the preclusive effect of federal judgments in diversity cases. As a consequence, if this Court sets aside the decision below, no federal litigant will face the uncertainty described by respondents. We also note that respondents are incorrect in asserting that Unocal "took 'a calculated risk' * * * that state law would permit relitigation." Br. in Opp. 7-8. We explain earlier on (at 4-5 n.4) that, in the proceedings below, Unocal (and, for that matter, respondents here) believed that federal law controlled the estoppel question; Unocal certainly did not think that it was exposing itself to the vagaries of state estoppel law by entering into the *Amos* settlement.

4. Finally, respondents' comments on the equities—in particular, their assertion that Unocal took a "calculated risk" in seeking vacatur—are insupportable. As an initial matter, it would be beside the point even if Unocal had made a calculation of the sort alleged by respondents; it would remain true that taking such a risk is unnecessary in the Second, Federal, Fourth, Tenth, and Eleventh Circuits, and is impossible in the Third, Seventh, and D.C. Circuits. Respondents offer no reason why the Ninth Circuit, and the Ninth Circuit alone, should impose this risk on litigants in federal cases.

But in any event, respondents misstate the circumstances here. Unocal certainly was aware that neither the district court nor the Ninth Circuit could guarantee that other courts would refrain from granting the vacated *Amos* judgment collateral effect, although at the time it requested vacatur Unocal made clear its view that such a use of the vacated judgment would be "illicit." E.R. 121.[8] Having advised the district court of its concerns in this regard, however, Unocal had every reason to assume that the very judge who vacated the *Amos* judgment—thus bringing about the dismissal of Unocal's appeal—would not himself give that judgment estoppel effect. At the same time, respondents' repeated suggestions that Unocal somehow acted in bad faith by trying "to have it both ways" (Br. in Opp. 8) or by making a "calculated decision to finesse a grant of vacatur" (*id.* at 12) have absolutely no basis in the record. Unocal and the *Amos* plaintiffs *jointly* filed a routine motion for

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[8] Had Unocal been estopped in such a court, it doubtless would have sought review in this Court on the ground that vacated judgments cannot have collateral effects.

vacatur with the district court; they surely were entitled to assume that, in acting on the motion, the court would be familiar with and would apply the controlling Ninth Circuit precedent.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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